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No. _____

# In the Supreme Court of the United States

SILVER SAGE PARTNERS, LTD, a California limited partnership; ROBERT E. FILLET, PAUL SABEN, RICHARD L. EARLIX, general partners and individually; MICHAEL S. LINSK; EDWARD MOORE, JR., and ALBERT PIMENTEL,

*Petitioners*,

v.

CITY OF DESERT HOT SPRINGS,

*Respondent*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Bankruptcy is always an unhappy event, but for a city and the citizens of it as well as those doing business with it, the consequences are especially fraught. The yield and return of capital that the municipal bondholders contracted for is jeopardized, potentially destabilizing the municipal finance markets. Thousands of creditors and the city's employees are also caught in a web of delay and face the risk of partial or no payment at all. The uncertainty generated by the filing likely will damage the investment climate not only for the city itself, but for all investments within the city and even in the state or region in which the city exists.[1]

Congress addressed these problems when it created a bankruptcy remedy for cities and local governments (with the concurrence of the state in which it exists) in the backdrop of

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[1] California determined that Orange County's bankruptcy, filed in late 1994, hurt the entire state. *See* Cal. Govt. Code §25350.55 at Note Sec. 2(c) ("It is in the interest of the state and all public debt issuers within the state to enable the county to finance an acceptable plan of adjustment in order to improve the credit standing of California public debt issuers and to preserve and protect the health, safety, and welfare of the residents of the county and the state. To that end, successfully resolving the [Orange] county bankruptcy and restoring the financial position of Orange County government and thereby permitting the full performance under the county's indebtedness is a matter of statewide interest and concern."). *See also White v. State of California*, 88 Cal. App. 4th 298, 305-6 (2001) ("Given the unique nature of the Orange County financial situation – which involved a public entity bankruptcy and voters who were unwilling to raise taxes to fund a bankruptcy recovery – the Legislature acted within its authority to determine that narrowly targeted legislation was necessary to protect the fiscal health of the county and the entire state...").

the United States' national economic depression of the 1930's. It therefore purposefully made entry into Chapter Nine bankruptcy status very difficult. Indeed in Chapter Nine bankruptcy, a city's right to "borrow" the federal government's ability to constitutionally abrogate contracts, which cities as arms of the states may not in the absence of bankruptcy do[2], is zealously rationed.

In order to be adjudged bankrupt, a city must prove that it meets Congress's preconditions, such as showing, with admissible evidence, that it has a "good faith" purpose and motive in filing, meet Congress's negotiation-of-a-confirmable-plan-with-its-creditors requirement prior to filing, and prove that it is actually insolvent upon a "cash-flow" basis.

Perforce, another major reason for Congress's strict requirements limiting city access to the bankruptcy courts is constitutional. In 1936[3], this Court declared the Bankruptcy Act of 1934 unconstitutional as violative of the Tenth Amendment (the reserved powers to the states clause) because it allowed the Bankruptcy Courts, instead of the cities, to manage or control the bankrupt city's spending and property and thus the political affairs of a city in bankruptcy. As a result of this Court's ruling, Chapter Nine of the Bankruptcy Act pertaining to cities was amended to eliminate a Bankruptcy Court's power over the day-to-day operations of

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[2] *See Ashton v. Cameron County Water Improvement Dist.*, 298 U.S. 513, 531, 56 S. Ct. 892, 80 L. Ed. 1309 (1936) ("The Constitution was careful to provide that 'No State shall pass any Law impairing the Obligation of Contracts.'"). *See also* U.S. Const. Art. 1, § 10 cl. 1.

[3] In *Ashton*, 298 U.S. at 530-31.

a city. In Chapter Nine, now, the Bankruptcy Court acts only as the referee between a city and its creditors, and it has no power as a result to protect creditors in any conventional way by limiting city spending or the disposition of its assets or by appointing a trustee, etc. Indeed, the only creditor protection in such a bankruptcy is to challenge the validity of a city's claim to bankruptcy status in the first place or to later, upon very limited grounds, seek dismissal of the bankruptcy.

Despite bankruptcy statutes stating otherwise, the Ninth Circuit recently ruled that an "order for relief", a ruling that the city qualifies to be in bankruptcy, is not immediately appealable because the appeal is beyond the Circuit's jurisdiction. This ruling directly contravenes Congress's express plan to prevent a state's power over its cities from being usurped by a federal court's control over the state's subdivisions. Therefore: Did Congress authorize jurisdictionally, as the Chapter 9 bankruptcy statutes indicate, that an order allowing a city bankruptcy to proceed over objection be immediately reviewable by appeal?

## LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

### Petitioners

The petitioners are Silver Sage Partners, Ltd., a California limited partnership; Robert E. Fillet, Paul Saben, Richard L. Earlix, Michael S. Linsk; and Edward Moore, Jr., and Albert Pimentel. Petitioners Silver Sage Partners, Ltd, with its general partners Robert E. Fillet, Paul Saben, and Richard L. Earlix; and Michael S. Linsk, are judgment creditors of the City of Desert Hot Springs, California. The Silver Sage petitioners have a federal question money judgment against the City. Edward Moore, Jr., and Albert Pimentel are creditors currently litigating civil rights claims against the City. Petitioners (collectively referred to as "Silver Sage") were the appellants in the Court of Appeals which considered whether or not the Bankruptcy Court's Order allowing the bankruptcy over their objection was an immediately appealable order.

### Respondent

The respondent is the City of Desert Hot Springs, California, a public entity and a "general law"[4] municipality in the State of California. Respondent is the debtor in the Chapter Nine bankruptcy, and the appellee in the Court of Appeals. Respondent filed for bankruptcy shortly after the U.S. Court of Appeals for the Ninth Circuit reinstated Silver Sage Partners, Ltd.'s multi-million-dollar jury verdict against the City.

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[4] *See* Cal. Govt. Code § 34102.

## TABLE OF CONTENTS

Question Presented . . . . . i

Parties to the Proceedings . . . . . iv

Table of Contents . . . . . v

Table of Authorities . . . . . vii

Opinions Below . . . . . 1

Statement of Jurisdiction . . . . . 2

Constitutional and Statutory Provisions Involved . . . . . 2

Statement of the Case . . . . . 3

Factual Background . . . . . 4

Reasons for Granting the Writ . . . . . 9

I. The Ninth Circuit's decision that an order allowing a municipal bankruptcy to proceed is unreviewable, repudiates Congress's intent and derogates this Court's view that the Tenth Amendment of the United States Constitution prohibits bankruptcy courts from usurping the power of the states to operate their own cities . . . . . 9

II. The Ninth Circuit decision that an order for relief - an order allowing a city into bankruptcy over objection - is unreviewable directly conflicts with the Third Circuit's decision as to precisely the same issue which holds that such orders are immediately appealable . . 16

III. The Ninth Circuit's holding that the Bankruptcy Court's denial of an Objection to a city's Chapter Nine bankruptcy is not immediately reviewable also directly conflicts with the Collateral Order Doctrine as explicated by this Court . . . . . 17

Conclusion . . . . . 26

Appendix

Appendix A - Ninth Circuit Order Amending Opinion and Denying Rehearing - 08/11/03 . . . . . 1a

Appendix B - Ninth Circuit Opinion - 04/29/03 . . . 5a

Appendix C - Ninth Circuit BAP Order - 04/17/02 . . . . . 20a

Appendix D - Bankruptcy Court Order - 03/12/02 . . . . . 24a

Appendix E - Bankruptcy Court Findings of Fact - 03/12/02 . . . . . 31a

Appendix F - Ninth Circuit Opinion - 06/01/01 . . . 52a

Appendix G - Constitutional and Statutory Provisions . . . . . 77a

Appendix H - Bankruptcy Act - Debts of Municipalities - P.L. 94-260 . . . . . 106a

Appendix I - *Pennbank v. Shenango* . . . . . 114a

## TABLE OF AUTHORITIES

**Cases**

*A.H. Robins Co. v. Piccinin*,
788 F.2d 994 (4th Cir. 1986) . . . . . 18

*Ashton v. Cameron County Water Improvement Dist.*,
298 U.S. 513, 56 S. Ct. 892,
80 L. Ed. 1309 (1936) . . . . . ii, 12

*Cohen v. Beneficial Indus. Loan Corp.*,
337 U.S. 541 (1949) . . . . . 17

*Estate of Macias v. Ihde*,
219 F.3d 1018 (9th Cir. 2000) . . . . . 5

*Gulfstream v. Mayacamas Corp.*,
485 U.S. 271, 108 S. Ct. 1133
99 L. Ed. 2d 296 (1988) . . . . . 17, 18, 19

*In re Bridgeport*,
129 B.R. 332 (Bankr. D. Conn. 1991) . . . . . 7

*In Re: City of Desert Hot Springs, Debtor,*
*Silver Sage Partners, Ltd., v. City of Desert Hot Springs*,
327 F.3d 930 (9th Cir. 2003) . . . . . 1

*In Re: City of Desert Hot Springs, Debtor,*
*Silver Sage Partners, Ltd., v. City of Desert Hot Springs*,
339 F.3d 782 (9th Cir. 2003) . . . . . 1

*In re Colorado Center Metropolitan District*,
113 B.R. 25 (Bankr. D. Colo. 1990) . . . . . 15

*In re Cottonwood Water and Sanitation District*,
138 B.R. 973 (Bankr. D. Colo. 1992) . . . . . 15

*In re Mason*,
709 F.2d 1313 (9th Cir. 1983) . . . . . 20

*In re Pan Am Corp.*,
16 F.3d 513 (2nd Cir. 1994) . . . . . 18, 19

*In re Richmond Sch. Dist.*,
133 B.R. 221 (Bankr. N.D. Cal. 1991) . . . . . 13

*In re Sullivan County Regional Refuse Disposal Dist.*,
165 B.R. 60 (Bankr. D.N.H. 1994) . . . . . 8, 14-15

*Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,
460 U.S. 1, 103 S. Ct. 927,
74 L. Ed. 2d. 765 (1983) . . . . . 18-19

*Pennbank v. Washabaugh (In re North and South Shenango Joint Municipal Authority)*,
8 B.C.D. 509, 5 C.B.C.2d 869 (3rd Cir. 1981) . 4, 16

*Richardson-Merrel Inc. v. Koller*,
472 U.S. 424, 105 S. Ct. 2757,
86 L. Ed. 2d 340 (1985) . . . . . 19

*United States v. Bekins*,
304 U.S. 27, 58 S. Ct. 811,
82 L. Ed. 1137 (1938) . . . . . 4, 6, 10, 12

*White v. State of California*,
88 Cal. App. 4th 298 (2001) . . . . . i

**Constitutional and Statutory Provisions**


U.S. Const. Art. I § 10 cl.1 . . . . . ii, 2
U.S. Const 10th Amendment . . . . . passim

11 U.S.C. § 109 . . . . . 2
11 U.S.C. § 109(c) . . . . . 14, 15, 18
11 U.S.C. § 109(c)(3) and (5) . . . . . 7
11 U.S.C. § 109(c)(5)(B) and (C) . . . . . 8
11 U.S.C. § 405 (1976) . . . . . 3, 11
11 U.S.C. § 903 . . . . . 2, 4, 12, 19
11 U.S.C. § 904 . . . . . 2, 4, 12, 13, 19
11 U.S.C. § 921 . . . . . 2, 3, 11
11 U.S.C. § 921(c) . . . . . 3, 14
11 U.S.C. § 921(e) . . . . . 10, 14
11 U.S.C. § 943 . . . . . 2
11 U.S.C. § 943(b)(4) . . . . . 6
28 U.S.C. § 1254(1) . . . . . 2

Cal Gov't Code § 970.2 . . . . . 6, 16
Cal Gov't Code §§ 970.2-971.1 . . . . . 3, 6
Cal Gov't Code §§ 975-978.8 . . . . . 3, 6
Cal Gov't Code § 25350.55 . . . . . 1, 3
Cal Gov't Code § 34102 . . . . . iv, 3

## PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case, which held that Congress neither stated, intended, and no other federal procedural rule allows, a Bankruptcy Court's grant of an "order for relief" (an order finding that a city met Congress's preconditions to file bankruptcy and granting a city bankruptcy status over creditor objection) to be immediately reviewable by appeal.

## OPINIONS BELOW

The April 29, 2003, opinion of the Ninth Circuit (App., infra, pages 5a-19a) is reported at *In Re: City of Desert Hot Springs, Debtor, Silver Sage Partners, Ltd., v. City of Desert Hot Springs*, 327 F.3d 930 (9th Cir. 2003). The August 11, 2003, order of the Ninth Circuit (App., infra, pages 1a-4a) amending the April 29, 2003 opinion, and denying the petition for rehearing en banc, was published at *In Re: City of Desert Hot Springs, Debtor, Silver Sage Partners, Ltd., v. City of Desert Hot Springs*, 339 F.3d 782 (9th Cir. 2003).

The April 17, 2002 order of the Bankruptcy Appellate Panel (App., infra, pages 20a-22a) denying petitioners Silver Sage Partners, Ltd., et al. ("Silver Sage") motion for leave to appeal and dismissing their appeal in its entirety because it was not a "final order", is unreported. The March 12, 2002 order and findings of the Bankruptcy Court (App., infra, pages 23a-31a) denying Silver Sage's objection to the respondent City of Desert Hot Springs ("City") bankruptcy petition and motion to dismiss the bankruptcy because the City's motive in filing was for a bad faith purpose and it

failed to meet Congress's preconditions to filing, is also unreported.

## STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment on April 29, 2003. Silver Sage's timely filed petition for rehearing en banc was denied on August 11, 2003, and the Ninth Circuit's order amending the original opinion, was filed on that same date. Petitioners Silver Sage invoke this Court's jurisdiction under 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions, which are reproduced in the Appendix at 77a-105a:

1. United States Constitution, Article 1, § 10, cl. 1

2. The Tenth Amendment to the United States Constitution

3. 11 U.S.C. § 109

4. 11 U.S.C. § 903

5. 11 U.S.C. § 904

6. 11 U.S.C. § 921

7. 11 U.S.C. § 943

8. 11 U.S.C. § 405 (1976) (current version at 11 U.S.C. § 921)

9. California Government Code §§ 970.2 - 971.1 and 975-978.8

10. California Government Code § 25350.55 at Note Sec. 2(c)

11. California Government Code § 34102

## STATEMENT OF THE CASE

This case of constitutional and federal statutory construction is one of first impression in this Court and, as it concerns issues of national scope, should be decided by this Court. Also, at least two Circuit Courts are in conflict as to whether an order allowing a municipality to obtain, over objection, bankruptcy status, is an immediately appealable order.

The Ninth Circuit's decision ignores Congress's statutory direction that such orders are reviewable by appeal. *See* 11 U.S.C. § 921(c) ("The court may not, on account of an appeal from a [bankruptcy court's] order for relief, delay any proceeding..."). Indeed, Congress contemplated an interlocutory appeal as of right for such orders. The Ninth Circuit's ruling to the contrary therefore renders Congress's pre-conditions to filing bankruptcy by cities merely advisory, as effective review of a city's preconditions to filing bankruptcy is not possible after the bankruptcy has been completed.

The effect of the Ninth Circuit's ruling is to jeopardize all creditors in a city bankruptcy who are, for constitutional

reasons, as this Court decided in *United States v. Bekins*, 304 U.S. 27, 51, 58 S. Ct. 811, 82 L. Ed. 1137 (1938), without any remedy to protect themselves. Indeed, they may not even seek to have a trustee appointed and the Bankruptcy Court has no power to control city spending or disposition of its property; creditors may not even ask the Court to impose a deadline upon a city to offer a plan to "adjust" it debts. *See* 11 U.S.C. §§ 903, 904.

Thus, the effect of not allowing an immediate appeal of an order allowing the bankruptcy to proceed is to condemn every creditor of a city in bankruptcy, to years of uncertainty and abuse - a result certain to harm the borrowing power of all municipalities and special purpose districts.

The Ninth Circuit's decision also conflicts with the Third Circuit's decision holding that orders for relief are reviewable by appeal as of right. *See Pennbank v. Washabaugh (In re North and South Shenango Joint Municipal Authority)*, 8 B.C.D. 509, 5 C.B.C.2d 869 (3rd Cir. 1981); App. infra, pages 114a-118a.

## FACTUAL BACKGROUND

The Silver Sage partnership sued Respondent, City of Desert Hot Springs ("City"), now a city of approximately 21,000 people (the City had approximately 5,000 residents when the litigation began), for violating the federal Fair Housing Act. The City refused in 1990 and mid-1991 to allow Silver Sage to utilize its already approved State of California Housing Department financing to complete development, by placing manufactured houses at its site in Desert Hot Springs (the development, at the time the City killed its financing, was vested for all land-use purposes). The City's actions therefore stopped completion of this

rent-restricted "low income" housing development. *See* App. infra, pages 53a-55a. The City's actions were taken in part because, as its City Manager later testified, the City Council wanted to exclude "Black and Mexican kids" from the City's "west side."

After years of pretrial delay and discovery abuse by the City, in 1994, a jury found the City violated the Act and awarded Silver Sage $3,040,439 in damages to compensate the partners for the lost economic value of their interest in the development. *See* App. infra, page 55a. However, the District Court denied the City's motion for a judgment notwithstanding the verdict, but found that the jury's award of damages was "grossly excessive" because it ruled that no developer or real estate syndicator could recover for their damages under the Fair Housing Act and because the future payments due Silver Sage were "too speculative". The District Court then denied the City's motion for a new trial on the condition that Silver Sage accept a remittitur to $388,146.20. *See* App. infra, page 56a. Silver Sage rejected the remittitur and a new trial on damages was ordered.

However, the new damages trial was not held until 1999. Although liability then stood established and the new trial was limited to setting the amount of Silver Sage's damages, the second jury, at the City's invitation, redisputed liability and awarded Silver Sage zero dollars (converted by law into nominal damages of $1)[5]. The District Court denied both

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[5] In the Ninth Circuit, if plaintiff proves a violation of his or her constitutional rights, then at least nominal damages must be awarded. *See Estate of Macias v. Ihde*, 219 F.3d 1018, 1028 (9th Cir. 2000) ("The trier of fact must award [at least] nominal damages to the plaintiff as a symbolic vindication of her constitutional right.") (quotations omitted).

Silver Sage's motion to amend the damages award and its motion for a new trial.

On June 1, 2001, in a published opinion filed a decade after the case began, the Ninth Circuit reversed the District Court's Order granting a new damages trial because the District Court erred as to who might properly recover under the Act and in its determination as to the recoverability of certain damages to be paid in the future. It therefore reinstated the 1994 jury verdict against the City. *See* App. infra, page 53a.

On December 19, 2001, after ignoring a series of letters from Silver Sage's counsel demanding City action to begin satisfying the judgment as state law requires[6], culminating in the offer of a "stand still" agreement until a District Court status conference, the City filed its petition for bankruptcy protection under Chapter Nine of the Bankruptcy Code.

The City freely admitted that it had been planning to file bankruptcy for some time, in order to forever evade payment of the judgment and compliance with any District Court Fair Housing Act remedial orders. *See*, *e.g.*, App. infra, page 9a.

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[6] The State of California *requires* that its cities pay all "final" judgments against them, regardless of the city's financial condition, either in its next fiscal year, in installments over ten years or with bonds taking up to thirty years to pay. *See* Cal. Govt. Code §§ 970.2; 970.2 through 971.2; and 975 through 978.8, respectively. Accordingly, the City went to Bankruptcy Court to evade state law – an improper motive since Chapter Nine bankruptcy requires compliance with all state law. *See* 11 U.S.C. § 943(b)(4). *See also Bekins*, 304 U.S. at 51 (Chapter 9 Bankruptcy constitutional only because all state laws must be complied with).

(Mayor of the City stating that as a result of its filing for bankruptcy, it would likely only pay 10 to 20 cents for every dollar it owed).

As a result of the petition for bankruptcy, the bankruptcy "automatic stay" prevented all creditors of the City from being paid, including of course, Silver Sage. Given the City's senior officials' (its mayor's and city manager's) expressions of improper motive (*see* App. infra, page 9a) and its failure to, in fact, qualify to file bankruptcy as it did not meet Congress's "gatekeeper"[7] pre-requirements to do so, Silver Sage filed an "objection to the bankruptcy petition and motion to dismiss the bankruptcy" on January 17, 2002.

Here, the City's motive was admittedly improper - to evade complying with state statutes which require it to pay all final judgments against it. It also never proved it was insolvent or met Congress's "negotiation of a confirmable plan" requirement. *See* 11 U.S.C. section 109(c)(3) and (5). Indeed, the evidence the City offered of insolvency was incomplete, outdated, and unauthenticated (fiscal year July 2000 - June 2001) financial statements (it filed bankruptcy six months after the date of its last statement). Moreover, its last statement actually showed that the City was in cash flow surplus as of the date it filed bankruptcy. *See* App. infra page 37a. ("[T]he City ... in the 1999 through 2001 fiscal years ... ran surpluses of approximately $264,000, $695,000, and $703,000, respectively.").

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[7] *See, e.g., In re Bridgeport*, 129 B.R. 332, 339 (Bankr. D. Conn. 1991) (Bankruptcy Court required to determine the eligibility of a city for Chapter 9 protection, and City has the burden of proof of eligibility).

Further, the City's financial statements did not include a list of the City's extensive fixed assets (which were required to be disclosed as a part of the negotiation of a confirmable plan with its creditors requirement). *See In re Sullivan County Regional Refuse Disposal Dist.*, 165 B.R. 60, 78 (Bankr. D. N.H. 1994) ("a party can hardly negotiate in good faith regarding unpaid obligations if it...refuses to throw into the negotiating equations a large and significant asset that it holds"). Indeed, the City never spent a single second attempting to negotiate in "good faith" a confirmable plan with Silver Sage (by far its largest creditor) or with its bondholders (1.3 million dollars), as required by Section 109(c)(5)(B) and (C).

The City opposed Silver Sage's objection and motion to dismiss, but conceded its filing motive was, in fact, to evade paying the Silver Sage judgment. It also conceded that it offered no admissible evidence to prove that its bankruptcy satisfied the Congressionally mandated pre-filing requirements. Nonetheless, on March 12, 2002, the Bankruptcy Court denied both Silver Sage's objection to the bankruptcy and its motion to dismiss, relying upon the City Manager's claim that he "believed" the City was insolvent because he (the manager) "believed" that the City's voters had other financial priorities than paying the judgment. *See* App. infra, page 46a.

Silver Sage timely filed a notice of appeal to challenge the Bankruptcy Court's ruling before the Bankruptcy Appellate Panel of the Ninth Circuit. However, on April 17, 2002, the Bankruptcy Appellate Panel construed Silver Sage's appeal to be interlocutory, and therefore exercised its discretion to dismiss the appeal in its entirety. *See* App. infra, pages 21a-22a.

Silver Sage appealed that order to the Ninth Circuit, arguing that the Bankruptcy Court's order was an appealable order, as shown by the statute itself and the legislative history of the relevant provision. The Ninth Circuit, after expediting the appeal, held that, as a jurisdictional matter, the Bankruptcy Court's Order was not final, and therefore that it did not have jurisdiction to hear the appeal. *See* App. infra, page 6a. It later denied Silver Sage's petition for rehearing. *See* App. infra, page 4a.

## REASONS FOR GRANTING THE WRIT

### I. The Ninth Circuit's decision that an order allowing a municipal bankruptcy to proceed is unreviewable, repudiates Congress's intent and derogates this Court's view that the Tenth Amendment of the United States Constitution prohibits bankruptcy courts from usurping the power of the states to operate their own cities

The question presented concerns whether the federal appellate courts have the jurisdiction to review a Bankruptcy Court's denial of an objection to a municipal Chapter Nine bankruptcy. The decision by the Court of Appeals was one of first impression in the Ninth Circuit, with only one other reported decision in the United States addressing this issue.

The Ninth Circuit's decision that such orders are not immediately appealable and therefore *de facto* are never reviewable (because preconditions to filing may not effectively be reviewed after a bankruptcy is over) contravenes the actual relevant statute itself as well as Congress's intent to, for constitutional reasons, limit bankruptcy court power. It therefore places at risk the delicate balance of federal and state power that this Court

crafted in *United States v. Bekins*. *Bekins* only allows city bankruptcies because the state's Tenth Amendment power to control its own political subdivisions was left unchallenged and federal preemption to evade state law requirements was strictly forbidden.

First, the Ninth Circuit misconstrued, in determining its jurisdiction, congressional intent on the appealability issue. The Court of Appeal ignored Congress's enactment of section 921(e) of Chapter Nine of the Bankruptcy Code. That provision references and therefore presupposes a right to an immediate review by appeal of an order of the Bankruptcy Court allowing a city bankruptcy to go forward over a creditor's or other interested party's objections. It specifically refers to what happens if an immediate appeal of the Bankruptcy Court's order allowing the bankruptcy *is* taken. It goes on to limit the effect of any such appeal. It directly states that the existence of the appeal is not grounds to stay the bankruptcy itself and also that any reversal of the Bankruptcy Court's order by appeal does not affect the validity of any debt incurred during the pendency of the bankruptcy, even if the bankruptcy is later dismissed because of the appeal. Section 921(e) reads:

> The [bankruptcy] court may not, on account of *an appeal from an order for relief* [automatically entered upon denial of an objection to the petition], delay any proceeding under this chapter in the case in which the appeal is being taken; nor shall any court order a stay of such proceeding *pending such appeal. The reversal on appeal* of a finding of jurisdiction does not affect the validity of any debt incurred that is authorized by the court under section 364(c) or 364(d) of this title.

11 U.S.C. section 921(e) (emphasis added).

The legislative history of subsection (e) of section 921, shows that it was enacted (in 1976) to allow an immediate appeal of an order for relief as of right. While the United States Senate version of subsection (e) (previously found at 11 U.S.C. section 405) "prohibited interlocutory appeals from a finding of jurisdiction" (because of a concern about delaying the bankruptcy proceedings and the notion that foregoing any immediate review of an order for relief would "increase the marketability of [] [certain kinds of municipal debts]." *See* App. infra, page 109a), the House version did not.

Indeed, the United States House of Representatives' version of the same bill allowed for the interlocutory appeal which had existed in the former version of Chapter Nine. *See also* App. infra, page 109a. ("The [United States] House bill had no comparable provision [prohibiting an interlocutory appeal]."). As the "Discussion of [the] First Proposed House Amendment to the Senate Amendments" states, *both* [Senate and House] ideas were adopted in the final bill. "The proposed text [of the joint and final bill actually enacted] includes compromise language designed to achieve [the allowance of an immediate interlocutory appeal, but also includes the Senate bill's language concerning the no-stay provision and the validity of debt incurred in the bankruptcy even if the bankruptcy was later dismissed, a rule which would enhance the marketability of the bonds]."). *Id.*

Thus, the compromise language of the bill that both houses of the legislature eventually passed (which remains in effect today) clearly evinces Congress's intent to allow an interlocutory appeal when a creditor's or other interested party's objection to a Chapter Nine is denied by the Bankruptcy Court. It also prohibits any stay of a city's bankruptcy on account of the appeal or harm to bond

marketability on account of the existence or even the success of the appeal as the Senate version of the bill proscribed:

> "[The compromise language which was actually adopted and passed as law] prohibits any delay of the proceedings [by the Bankruptcy Court] *because of an appeal from a finding of jurisdiction*, and any stay pending such an appeal. It also specifies, in an attempt to codify the result currently achieved in chapter X [the name of Chapter Nine's predecessor], that the reversal on appeal of a finding of jurisdiction shall not, in and of itself, affect the validity of any certificate of indebtedness."

App. infra, page 109a.

The Ninth Circuit's decision also contravenes the state's power over its subdivisions and this Court's precedent affirming that right. *See, e.g., Ashton v. Cameron County Water Improvement Dist.*, 298 U.S. 513, 531, 56 S. Ct. 892, 80 L. Ed. 1309 (1936) (striking down Chapter Nine because of the Bankruptcy Court's power to control a state's subdivisions), and *United States v. Bekins*, 304 U.S. 27, 51, 58 S. Ct. 811, 82 L. Ed. 1137 (1938) (finding the present version of Chapter Nine constitutional only because Congress directed that the Bankruptcy Court require cities to comply with state law: "The [bankruptcy] statute is carefully drawn so as not to impinge upon the sovereignty of the State."). *See also, e.g.*, 11 U.S.C. § 903 ("This chapter does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental powers of such municipality, including expenditures for such exercise...") and § 904 ("Notwithstanding any power of the court, unless the debtor consents or the plan so provides, the court may not, by any

stay, order, or decree, in the case or otherwise, interfere with (1) any of the political or governmental powers of the debtor; (2) any of the property or revenues of the debtor; or (3) the debtor's use or enjoyment of any income-producing property.").[8]

The Bankruptcy Court's lack of control over a city in bankruptcy is why Congress specifically required in Chapter Nine of the Bankruptcy Code that cities prove that their

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[8] *See In re Desert Hot Springs*, quoting *In re Richmond Sch. Dist.*, 133 B.R. 221, 225 (Bankr. N.D. Cal. 1991), to explain the unusual situation of a Chapter Nine municipal bankruptcy:

> [Chapter Nine provides] a [municipal] debtor with an array of bankruptcy powers to enable it to achieve financial rehabilitation with very few, if any, corresponding limitations and duties of the type to which a Chapter Eleven [corporate] debtor is subject. For example, a Chapter Nine debtor is not subject to the reporting another general duties of a Chapter Eleven debtor in possession under section 1107, and pursuant to section 904, may borrow and spend without court authority. Unlike any of the other chapters, Chapter Nine makes no provision for conversion of the case to another chapter or for an involuntary liquidation of any of the debtor's assets. At the same time, a Chapter Nine debtor enjoys a full expanse of bankruptcy powers, including the benefit of an enhanced automatic stay pursuant to section 362(a) and 922(a), the right to avoid preferences, fraudulent conveyances and other transfers as provided in section 544 through 549, the authority to borrow monies on the security of liens senior to existing liens of record pursuant to section 364(c), the right to reject executory contracts pursuant to section 365, and the ability to bind all creditors by a confirmed plan pursuant to section 944.

App. infra, pages 13a-14a.

bankruptcy filing is in "good faith" as to motive and purpose and that it meet Congress's preconditions to file in order to make certain that the benefits of Chapter Nine were available to only those cities that actually qualified to be there. *See In re Sullivan County Regional Refuse Disposal District*, 165 B.R. 60, 82 (Bankr. D. N.H. 1994) ("Municipal bankruptcy is quite unlike bankruptcy for individuals or as private corporations. The bankruptcy court's jurisdiction should not be exercised lightly in chapter 9 cases, in light of the interplay between Congress' bankruptcy power and the limitations on federal power under the Tenth Amendment. Considering the bankruptcy court's severely limited control over the debtor, once the petition is approved, access to chapter 9 relief has been designed to be an intentionally difficult task.") It is also why Congress provided for an immediate review by appeal should a mistake as to the determination of those issues be made by the Bankruptcy Court. *See* 11 U.S.C. section 921(e). *See, e.g.*, 11 U.S.C. section 921(c); *In re Sullivan County Regional Refuse Disposal District*, 165 B.R. 60, 80 (Bankr. D. N.H. 1994) ("Chapter Nine is the only chapter which currently expressly mentions good faith as a prerequisite to filing [bankruptcy]...").

The good faith requirement includes, in addition to an examination of purpose, a duty to satisfy all the pre-filing requirements of the Bankruptcy Code found in 11 U.S.C. section 109(c).[9] *See In re Sullivan*, 165 B.R. at 72-80

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[9] While the Ninth Circuit's analysis is correct that all bankruptcies must be filed with a good faith motive (*see* App., infra, page 19a, Chapter Nine imposes unique good faith requirements that address both the motive or purpose for the filing, and also mandate that the City *prove* that it meets the qualifications for filing a bankruptcy. It is the good faith proof of qualification requirement that is unique to Chapter Nine. *See In re Sullivan County Regional Refuse*

(explaining that a municipal debtor has a "good faith" duty to satisfy each of the pre-filing requirements of 11 U.S.C. section 109(c) or the bankruptcy must be dismissed); *In re Colorado Center Metropolitan District*, 113 B.R. 25 (Bankr. D. Colo. 1990). One of the most important pre-filing requirements (which, here, the City clearly did not meet) is the good faith negotiation-of-a-confirmable-plan with creditors:

> "Congress consciously sought 'to limit accessibility to the Bankruptcy Court' by municipalities. One way to do so was to require the municipal entity, before rushing to [] [the Bankruptcy] Court, to first seek to negotiate in good faith concerning the treatment the creditors may be expected to receive under a plan to be filed under section 941 of the Code***[This 'creditor protection' provision] insures that creditors have an opportunity to negotiate concerning a plan on a level playing field with the debtor before their rights are further impaired."

*See In re Cottonwood Water and Sanitation District*, 138 B.R. 973, 979 (Bankr. D. Colo. 1992) (citations omitted).

Additionally, the facts of this case show that preventing the immediate appeal that Congress authorized creates the opportunity for the Tenth Amendment power of the states to be ignored. Here, the City admits it filed to avoid compliance with the California statutes which require it to pay all final judgments against it. *See* App. Infra, page 9a (Mayor of the

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*Disposal District*, 165 B.R. 60, 80 (Bankr. D. N.H. 1994) ("[] Chapter 9 is the only chapter which currently expressly mentions good faith as a prerequisite to filing...").).

City said that as a result of its filing for bankruptcy, it would likely only have to pay 10 to 20 cents for every dollar it owed). *Compare* Cal. Gov. Code § 970.2 (requiring payment in full of all judgments).

Accordingly, the lack of any review by appeal allows the state's Tenth Amendment control over its own political subdivisions to be disregarded, perhaps for many years, on the say-so of one mistaken Bankruptcy Court ruling - a ruling that is, in the Ninth Circuit's view, unreviewable for years, if ever. The Ninth Circuit's view invites the Bankruptcy Courts, through the preemption power of the automatic stay, to nullify a City's obligation to comply with state statutes and requirements. This is precisely the opposite of Congress's expressed intent and puts the Ninth Circuit directly in conflict with the rationale that this Court used to find Chapter Nine constitutional.

## II. The Ninth Circuit decision that an order for relief - an order allowing a city into bankruptcy over objection - is unreviewable directly conflicts with the Third Circuit's decision as to precisely the same issue which holds that such orders are immediately appealable

The Ninth Circuit's decision also directly conflicts with the Third Circuit's decision as to the appealability of an "order for release" in Chapter Nine cases. In *Pennbank v. Washabaugh (In re North and South Shenango Joint Municipal Authority)*, 8 BCD 509, 5 CBC2d 869 (3rd Cir. 1981), the Third Circuit held that a writ of mandamus was unavailable to review a Bankruptcy Court's "order for relief", entered after a Bankruptcy Court denied a creditor's objection to the bankruptcy in a Chapter Nine bankruptcy filing, because "[t]he issue of jurisdiction [stemming from the grant of an "order for relief"] may be raised through the prescribed

process of appeal". *See also* that case's sequel, companion case, *In the matter of: North and South Shenango Joint Municipal Authority*, 80 B.R. 57 (WD PA 1982) (the district court, considering the immediate appeal of an "objecting" party to a Bankruptcy Court's grant of an "order for relief", reversing the Bankruptcy Court and therefore sustaining the creditor's objection to the bankruptcy and dismissing it).

## III. The Ninth Circuit's holding that the Bankruptcy Court's denial of an Objection to a city's Chapter Nine bankruptcy is not immediately reviewable also directly conflicts with the Collateral Order Doctrine as explicated by this Court

The Ninth Circuit also declined to allow an immediate appeal by refusing to apply this Court's "collateral order" doctrine, adopted in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Even in the absence of the statutory language assuming a right to an immediate appeal of a denial of creditor's objection to the bankruptcy provided in Chapter Nine, it would still be appropriate to allow the immediate appeal based upon that doctrine - particularly in light of its broad use in bankruptcy decisions by other Circuits as to other issues decided to the prejudice of creditors.

A proper analysis of this Court's "collateral order doctrine" shows that a Bankruptcy Court order denying an objection to a Chapter Nine bankruptcy should be immediately reviewable. A collateral order is reviewable under *Cohen* if it (1) conclusively determines the question presented; (2) resolves an important issue that is completely collateral to the merits; and (3) concerns a right that would be effectively unreviewable after a final judgment on the merits. *See Gulfstream v. Mayacamas Corp.*, 485 U.S. 271, 276, 108 S. Ct. 1133, 99 L. Ed. 2d 296 (1988).

With specific regard to a Bankruptcy Court's order, the three *Gulfstream* factors are applied flexibly, to ensure the efficient administration of a bankruptcy case. *See A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1009 (4th Cir. 1986) (applying a "relaxed" standard to meet the collateral order doctrine requirements in bankruptcy cases because bankruptcy cases are (as this very case shows) frequently protracted, involve many parties, and it would be wasteful of time and resources to review, or try to review, certain questions and actions after the bankruptcy is over). *Accord In re Pan Am Corp.*, 16 F.3d 513, 515 (2nd Cir. 1994) ("In evaluating whether an order involving a bankruptcy proceeding is reviewable, [the court should] appl[y] the three [] factors [of the collateral order doctrine] *flexibly*.") (emphasis added).

Contrary to the Ninth Circuit's cursory analysis, all three requirements of the collateral order doctrine are met here. First, the Bankruptcy Court's order declining to dismiss the City's bankruptcy conclusively determines whether the City qualifies to be in bankruptcy for a proper purpose and that it met Congress' entry requirements. *See* App. infra, pages 44a-45a. (overruling Silver Sage's motion to dismiss and objections to the City's bankruptcy, and finding that the City has met the "gatekeeper" requirements of 11 U.S.C. § 109(c)). *Compare Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 12 n. 14, 103 S. Ct. 927, 74 L. Ed. 2d. 765 (1983) (holding as final an order "made with the expectation that [it] would be the final word on the subject addressed").

The second *Gulfstream* prong is also satisfied because the City's eligibility to file bankruptcy is "collateral" to or separate from a final determination as to whether the City successfully proposed and confirmed a plan under Chapter Nine to "adjust" its debts. *See Moses H. Cone*, 460 U.S. at

12, n. 13 (the "collateral requirement" reflects the principle that "there should not be piecemeal review of steps towards final judgment in which they will merge") (citations omitted).

The second and third (and final) *Gulfstream* prongs are satisfied here for another reason. If no immediate appeal is allowed, the Bankruptcy Court's decision is effectively unreviewable after the conclusion of the bankruptcy. *See Richardson-Merrel Inc. v. Koller*, 472 U.S. 424, 430-31, 105 S. Ct. 2757, 86 L. Ed. 2d 340 (1985) (an order "affecting rights that will be irretrievably lost in the absence of an immediate appeal" meets the third prong of the collateral order doctrine).

Indeed, with no immediate review of a decision allowing a city to proceed in bankruptcy despite its improper purpose and in contravention of Congress's requirements, the City may, in a Chapter Nine bankruptcy, transfer its property and spend money or commit future monies at its whim, no matter how self-interested or frivolous its motive or purpose and no matter whether such conduct violates state law or not. Indeed, in this very case, the City has already spent millions of dollars on attorneys' fees to maintain its own improper bankruptcy and as it concedes, for the express purpose of evading state law which requires that it pay in full the final judgment against it.

The property and money spent or converted to other "municipal" purposes is gone for all intents and purposes and none of a city's conduct is "reviewable" at the end of the bankruptcy because there is no remedy to halt this activity by a city in bankruptcy in the first place, and such a challenge to the City's conduct is not possible at any other time. *See*, 11 U.S.C. § 903, 904. *Compare e.g.*, *In re Pan Am Corp.*, 16 F.3d at 516 (allowing appeal even where appeal could be had

later, on grounds that doing so would prevent "depleti[on of the debtor's] funds available to its creditors"). *Compare also In re Mason*, 709 F.2d 1313, 1317 (9th Cir. 1983) (affirming immediate appeal right by debtor in Chapter Seven individual bankruptcy because there is "no way" for the debtor to get his/her property back from "bona fide purchaser").

## CONCLUSION

Because Congress provided for a right to an immediate appeal of a Bankruptcy Court's decision to allow a city bankruptcy to go forward over a creditor's objection, and the Ninth Circuit ignored that right and the Third Circuit's recognition of that right, certiorari should be granted in this case. Also, since the Ninth Circuit's ruling contravenes Congress's intent that the states' rights under the Tenth Amendment not be infringed by the Bankruptcy Courts, by allowing cities to evade state laws not to their liking by *de facto* preempting them in federal bankruptcy court, review is especially appropriate for this reason as well.

Respectfully Submitted,

DAVIS & COMPANY

By: William J. Davis
*Counsel of Record*

Attorneys for Petitioners

## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**No. 02-55835**

**[Filed August 11, 2003]**

| | |
|---|---|
| IN RE: CITY OF DESERT HOT SPRINGS, | ) |
| Debtor, SILVER SAGE PARTNERS, LTD., | ) |
| Richard Earlix, Robert E. Fillet, Paul Saben, | ) |
| Michael Link, Edward Moore, Jr. and | ) |
| Albert Pimentel, | ) |
| Appellant, | ) |
| v. | ) |
| | ) |
| CITY OF DESERT HOT SPRINGS, | ) |
| Appellee. | ) |
| | ) |

**JUDGES**

Before: Warren J. Ferguson, Cynthia Holcomb Hall, and Marsha S. Berzon, Circuit Judges.

## ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING EN BANC

The opinion filed April 29, 2003, and found at 327 F.3d 930, is hereby amended as follows:

p. 931, first paragraph, line 5: Change "motion to dismiss" to "objection to and motion to dismiss"

p. 931, first paragraph, line 10: Change "moved to dismiss the bankruptcy" to "objected to and moved to dismiss the bankruptcy"

p. 933, final paragraph of "Background" section: Delete the first sentence and replace with: "In bankruptcy court, Silver Sage objected to and moved to dismiss the bankruptcy because it claimed that the City filed the bankruptcy in bad faith."

p. 933, first sentence of "Waiver" section: Change "denial of the motion to dismiss" to "denial of the motion"

p. 936, first full paragraph, first sentence: Change "in the context of motions to dismiss" to "in the con-text of objections to and motions to dismiss a bankruptcy"

p. 936, first full paragraph: Delete second sentence and replace with the following: "A court's denial of such a motion merely allows the municipality to proceed with the bankruptcy."

p. 936, second column, line 5: Change "motion to dismiss" to "objection to"

p. 937, first full paragraph: Delete the second sentence and replace with the following: "As noted above, the procedures that must be followed before an order for relief is granted in an involuntary case are similar to the procedures that must be followed before relief is granted in any other lawsuit. The

procedures to be followed before relief is granted in a chapter 9 case, however, cannot be similarly characterized."

p. 937, first full paragraph, last sentence: Change "debtors will go into bankruptcy." to "debtors will file for bankruptcy."

p. 937, first full paragraph, last sentence: Add foot-note 4: "We do not decide whether a Chapter 9 order for relief issues automatically once the municipality files a voluntary petition, 11 U.S.C. § 301, or whether the court must first consider objections to the bankruptcy under 11 U.S.C. § 301(c) before entering the order for relief. *Compare* Collier on Bankruptcy, 15th ed. revised, § 921.04[5] *with In re Colorado Centre Metropolitan Dist.*, 113 B.R. 25, 27 (Bankr. N.D. Col. 1990). Regardless of when the order for relief is entered, we hold that chapter 9 supplies a creditor with adequate protections against irreparable harm to distinguish *In re Mason*, 709 F.2d 1313."

p. 938, first full paragraph, first sentence: Change "The denial of a motion to dismiss" to "The denial of an objection to and a motion to dismiss"

p. 938, first sentence of "Conclusion" section: Change "motion to dismiss" to "motion to dismiss and objections to"

p. 938, second sentence of "Conclusion" section: change "motion to dismiss" to "motion"

With this amendment, the panel has voted to deny appellant's petition for panel rehearing. Judge Berzon has voted to deny the petition for rehearing en banc and Judges

Ferguson and Hall so recommend. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

The clerk shall accept no further filings in this specific appeal.

## APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**No. 02-55835**

**[Filed April 29, 2003]**

| | |
|---|---|
| IN RE: CITY OF DESERT HOT SPRINGS, Debtor, SILVER SAGE PARTNERS, LTD., Richard Earlix, Robert E. Fillet, Paul Saben, Michael Link, Edward Moore, Jr. and Albert Pimentel, Appellant, | ) |
| v. | ) |
| CITY OF DESERT HOT SPRINGS, Appellee. | ) |

Appeal from the Ninth Circuit Bankruptcy Appellate Panel
Perris, Marlar and Montali, Bankruptcy Judges, Presiding
BAP No. CC-02-01164-MoPMa

**JUDGES:** Warren J. Ferguson, Cynthia Holcomb Hall, and Marsha S. Berzon, Circuit Judges

## OPINION

HALL, Circuit Judge:

Silver Sage Partners, Ltd. ("Silver Sage") appeals the Bankruptcy Appellate Panel's ("BAP") dismissal of its appeal from an order of the bankruptcy court denying Silver Sage's motion to dismiss a chapter 9 bankruptcy. After the City of Desert Hot Springs ("City") filed for bankruptcy protection under chapter 9 of the bankruptcy code, 11 U.S.C. § 901 et seq., Silver Sage moved to dismiss the bankruptcy, claiming that it was brought in bad faith. The bankruptcy court denied its motion. Silver Sage appealed to the BAP. The BAP construed Silver Sage's appeal as interlocutory and exercised its discretion not to hear the appeal. Silver Sage argues here that the BAP erred by construing its appeal as interlocutory. Silver Sage claims that the bankruptcy court's order was a final decision and the BAP was therefore obliged to hear an appeal from such a decision. 28 U.S.C. § 158(a)(1).

The bankruptcy court had jurisdiction over Silver Sage's motion to dismiss the bankruptcy under 28 U.S.C. §§ 157 and 1334(a). The BAP had jurisdiction pursuant to 28 U.S.C. § 158(a). Because the [*932] bankruptcy court's order was interlocutory, we have no jurisdiction and **DISMISS** the appeal.

## BACKGROUND

Silver Sage is a partnership organized to purchase and develop low income housing. After the City refused to authorize Silver Sage to build certain low income housing projects, Silver Sage sued the City for, *inter alia*, violations

of the Federal Fair Housing Act. A trial was held in the federal district court for the central district of California. A jury found the City liable and awarded Silver Sage approximately three million dollars in damages. The City moved for a judgment notwithstanding the verdict or, in the alternative, for a new trial. Shortly after the jury verdict but before the district court ruled on the City's new trial motion, Silver Sage served a writ of execut on on the City's bank, thereby freezing funds the City used for basic city services, such as payroll, utilities and insurance premiums for worker's compensation. The district court quashed the writ and ordered Silver Sage to show cause for why it should not be sanctioned.

The district court denied the City's motion for a judgment notwithstanding the verdict. The district court, however, found the jury's award of damages "grossly excessive" but denied the motion for a new trial on the condition that Silver Sage accept a remittitur to $388,146.20. Silver Sage rejected the remittitur and a new trial on damages was held. The second jury awarded Silver Sage one dollar. The district court denied both Silver Sage's motion to amend the damages award and its motion for a new trial.

Silver Sage appealed to this court. Because the district court abused its discretion by vacating the first jury's award of damages, we reversed and reinstated the original award of damages. *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001). Around the time that our opinion was filed, the City began consulting with bankruptcy experts in contemplation of possibly filing for bankruptcy, under Chapter 9 of the Bankruptcy Act.

The mandate from this court issued about six months after our opinion was filed. Upon issuance of the mandate, the City asked for assurances from Silver Sage that it would not again attempt to freeze the City's bank accounts. Silver Sage responded by demanding that it be paid and refusing to give the City any assurances. The City then filed a motion in district court that would order Silver Sage not to take any illegal actions to collect its judgment. Silver Sage responded that if the City did not express its willingness to immediately pay the judgment within two days, it would begin the collection process. The City then sought *ex parte* relief in the district court, seeking an order that would temporarily restrain Silver Sage from levying on its bank accounts. Silver Sage then told the City that it would not seek to freeze the City's bank accounts if the City agreed to several conditions. Silver Sage demanded that: 1) the City agree to an order from the district court that it immediately pay the judgment; 2) the City propose a plan within three weeks to pay the judgment and attorney's fees; 3) the City agree to make no expenditure not in the regular course of business; and 4) the City agree that any payment that Silver Sage disputes is not in the regular course of business not be relied upon to justify the City's not paying the judgment or interest on the judgment. The City decided it could not meet those demands. The district court denied the city's motion for *ex parte* relief with no explanation.

The City apparently believed that Silver Sage was not interested in negotiating in good faith a plan to pay the judgment. Before the hearing on the City's original motion to stop Silver Sage from taking illegal action to enforce its judgment, the City filed a voluntary petition for bankruptcy under chapter 9 of the bankruptcy code, 11 U.S.C. § 901 et

seq. As a result of the petition for bankruptcy, an automatic stay was placed on all efforts by Silver Sage to collect its judgment. 11 U.S.C. § 362.

In a press release, the City stated that it commenced the bankruptcy because "Silver Sage has threatened to seize the city bank accounts and levy on city assets." According to an article in the *Desert Sun*, the Mayor of the City said that as a result of its filing for bankruptcy, it would likely only pay 10 to 20 cents for every dollar it owed.

In bankruptcy court, Silver Sage moved to dismiss the bankruptcy because it claimed that the City filed the bankruptcy in bad faith. The bankruptcy court denied the motion on February 15, 2002. Silver Sage filed a notice of appeal and made a motion in the BAP for leave to appeal. The BAP refused to hear the appeal, construing it to be from an interlocutory order. Silver Sage appealed to this court. Silver Sage does not ask us to rule on the merits of its claim that the City filed for bankruptcy in bad faith. Rather, it asks that we remand the case to the BAP and order the BAP to consider the appeal on the merits. The City contends that this court is without jurisdiction.

## STANDARDS OF REVIEW

We review our own jurisdiction *de novo*. *Miller v. Commissioner*, 310 F.3d 640, 642 (9th Cir. 2002). Whether a bankruptcy court's decision is final, under 28 U.S.C. § 158(d) is a question of law reviewed de novo. *Alexander v. Compton (In re Bonham)*, 229 F.3d 750, 760-61 (9th Cir. 2000).

## WAIVER

The City argues that Silver Sage waived the argument that the bankruptcy court's denial of the motion to dismiss was a final decision. We reject the City's argument. If a party fails to argue to the court below that a decision of the bankruptcy court is final, we will not consider such an argument. *Ryther v. Lumber Products Inc. (In re Ryther)*, 799 F.2d 1412, 1414 (9th Cir. 1986). In *Ryther*, we noted that if a litigant is unsure about the nature of an order, the litigant should file both a notice to appeal and a motion for leave to appeal before the BAP or district court. *Id.* Silver Sage did just that. Moreover, in Silver Sage's motion for leave to appeal before the BAP, Silver Sage argued in part that the BAP was obliged to hear the appeal because it was from a final decision of the bankruptcy court. Silver Sage therefore properly raised the issue before the BAP and we consider it.

## JURISDICTION

The courts of appeals do not have jurisdiction to hear interlocutory appeals in bankruptcy cases. Whether we have jurisdiction therefore depends upon the nature of the bankruptcy court's order denying Silver Sage's motion to dismiss. Parties may appeal decisions of a bankruptcy court to either the district court or to the BAP. 28 U.S.C. § 158(a-b). The district court or BAP must hear appeals from final decisions of the bankruptcy courts. So must we. It is within the discretion of the district court and the BAP, however, to hear interlocutory appeals. *Id.* at 158(a). We have no jurisdiction to consider whether such exercises of discretion are proper. The courts of appeals only have jurisdiction to review the "final decisions, judgments, orders and decrees"

entered by the BAP or district courts. *Id.* at § 158(d).[1] Silver Sage argues that the BAP erred by construing its appeal as interlocutory and should have construed it to be an appeal from a final decision. The City, on the other hand, argues that the BAP correctly construed the nature of Silver Sage's appeal and it therefore had discretion not to hear the appeal. The City furthermore argues that we are without jurisdiction because the BAP's exercise of discretion in this regard is not subject to our review. We agree with the City -- the BAP had discretion to not hear Silver Sage's appeal and this exercise of discretion is not subject to our review.

We have developed a "pragmatic" approach to deciding whether orders in bankruptcy cases are final, "recognizing that certain proceedings in a bankruptcy case are so distinct and conclusive either to the rights of individual parties or the ultimate outcome of the case that final decisions as to them should be appealable as of right." *In re Mason*, 709 F.2d 1313, 1317 (9th Cir. 1983). Although our approach to finality is quite flexible in bankruptcy cases, traditional finality concerns still "dictate that we avoid having a case make two complete trips through the appellate process." *Law Offices of Nicholas A. Franke v. Tiffany (In re Lewis)*, 113 F.3d 1040, 1043 (9th Cir. 1997) (internal quotations and citations omitted).

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[1] We do not separately consider Silver Sages's argument that the collateral order doctrine applies. The same considerations which lead us to conclude that denying Silver Sage an immediate appeal causes no irreparable harm also lead us to conclude that the bankruptcy court's ruling is not "effectively unreviewable on appeal from a final judgement." *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1066 (9th Cir. 2000).

We have squarely addressed the issue of whether the denial of a motion to dismiss a chapter 11 bankruptcy for bad faith is a final decision. In *In re 405 N. Bedford Dr. Corp.*, 778 F.2d 1374 (9th Cir. 1988), two creditors filed a motion to dismiss a corporation's voluntary petition for chapter 11 bankruptcy, arguing that the petition was filed in bad faith. *Id.* at 1376. After the bankruptcy court denied the motion and the district court affirmed, the creditors sought review in this court. We held that the bankruptcy court's denial of the creditors' motion to dismiss was not a final decision. *Id.* at 1377. We were not convinced that the creditors were faced with irreparable injury by the denial of the motion. We pointed to several provisions of the bankruptcy code that protected their rights. *Id.* at 1377-78. We further noted that the bankruptcy at issue was a voluntary one. In involuntary bankruptcies, a debtor's property is immediately subject to liquidation by the courts. Creditors are not subject to such drastic measures when a voluntary petition is allowed to proceed. *Id.* at 1378. Finally, we found that immediate appeals from denials of motions to dismiss would cause unnecessary delay because the bankruptcy court would have to choose between delaying the reorganization process pending appeal or continuing the process at the risk that it will be all for naught. *Id.* at 1379. In *In re Rega Properties,* 894 F.2d 1136 (9th Cir. 1990), we again addressed the issue of the nature of an appeal from the denial of a motion to dismiss a chapter 11 bankruptcy for bad faith filing. We came to the same conclusion as *405 N. Bedford Dr.*. *Id.* at 1377-78.

Were this a chapter 11 case, we could dispose of this appeal by merely citing the two cases discussed above. The City asks us to do just that. This is not a chapter 11 case, however. This is a chapter 9 case and, as Silver Sage

correctly points out, there are significant differences between a chapter 11 bankruptcy and a chapter 9 bankruptcy. These differences change the analysis of the question of finality in such a way that we cannot simply rely on *405 N. Bedford Dr.* and *Rega Properties* alone to resolve this appeal.

Congress, in an effort to avoid possible constitutional problems, designed chapter 9 of the bankruptcy code in a manner much different from the other chapters. Many of the protections afforded to creditors in the other chapters are missing in chapter 9. The court in *In re Richmond Sch. Dist.*, 133 B.R. 221, 225 (Bankr. N.D. Cal. 1991), explained some of the unique aspects of a chapter 9 bankruptcy:

> [Chapter 9 provides] a debtor with an array of bankruptcy powers to enable it to achieve financial rehabilitation with very few, if any, corresponding limitations and duties of the type to which a Chapter 11 debtor is subject. For example, a Chapter 9 debtor is not subject to the reporting and other general duties of a Chapter 11 debtor in possession under section 1107, and pursuant to section 904, may borrow and spend without court authority. Unlike any of the other chapters, Chapter 9 makes no provision for conversion of the case to another chapter or for an involuntary liquidation of any of the debtor's assets. At the same time, a Chapter 9 debtor enjoys a full expanse of bankruptcy powers, including the benefit of an enhanced automatic stay pursuant to sections 362(a) and 922(a), the right to avoid preferences, fraudulent conveyances and other transfers as provided in sections 544 through 549, the authority to borrow monies on the security of liens senior to

> existing liens of record pursuant to section 364(c), the right to reject executory contracts pursuant to section 365 and the ability to bind all creditors by a confirmed plan pursuant to section 944.

*Id.* (footnote omitted).

In *405 N. Bedford Dr.* we pointed to several sections of the bankruptcy code as examples of the protections afforded creditors in chapter 11. *405 N. Bedford Dr.*, 778 F.2d at 1377-78 (pointing to 11 U.S.C. §§ 361, 362, 363(e), 363(f), 1104, 1121). Of those sections, only two are applicable in a chapter 9 case -- sections 361 and 362. 11 U.S.C. § 901.[2]

The two sections to which the court points, that are applicable in chapter 9, act as protections for both debtors and creditors. Section 362 automatically stays judicial proceedings against the debtor and stays the enforcement of uncollected judgments. *Id.* at § 362(a). Under certain circumstances, however, creditors may be relieved, in whole or in part, from the automatic stay.[3] A creditor may be granted relief from a stay "for cause, including the lack of adequate protection of an interest in property." *Id.* at § 362(d)(1). A creditor may be

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[2] Section 901 of the bankruptcy code lays out which sections of the bankruptcy code, applicable to other chapters, are applicable to chapter 9.

[3] The denial from relief from an automatic stay *is* a final decision subject to immediate appeal. *In re American Mariner Indus.*, 734 F.2d 426, 429 (9th Cir. 1984), *overruled on other grounds by United Sav. Assoc. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 98 L. Ed. 2d 740, 108 S. Ct. 626 (1988).

granted relief from a stay if the property is not necessary to effectuate a plan of reorganization. *Id.* at § 362(d)(2). Section 361 allows the court to order the debtor, or its trustee, to make certain payments as compensation for losses accrued when adequate protections of secured interests do not fully compensate for losses. *Id.* at § 361.

When determining whether an order is final, in the context of motions to dismiss, our cases are concerned with whether an order finally determines an issue in such a way that addressing the issue later would not serve to prevent a party from suffering irreparable injury. *E.g. Rega Properties*, 894 F.2d at 1138; *405 N. Bedford Dr.*, 778 F.2d at 1377; *Mason*, 709 F.2d at 1317-18. A court's denial of a motion to dismiss merely allows the municipality to remain in bankruptcy -- it maintains the status quo in that the bankruptcy court's order for relief is not withdrawn. We are not convinced that Congress's whole municipal bankruptcy statutory scheme is so skewed in favor of the municipality that the commencement of proceedings itself causes irreparable injury. To so hold would essentially say that a creditor's rights are determined before the bankruptcy process really begins. As discussed above, creditors do have less rights in a chapter 9 than in any other chapter but they still do have rights. Notably, they have the right, under 11 U.S.C. § 362(d), to be granted relief from the automatic stay against enforcement of judgments. As noted above, the denial of such relief *is a final decision* and is therefore immediately appealable to this court. *American Mariner Indus.*, 734 F.2d at 429. Such relief is a more appropriate way in which to address Silver Sage's concerns. A motion for relief from an automatic stay allows a court to provide focused relief tailored

to the special needs and circumstances regarding a particular creditor.

Other remedies also exist. A creditor can ask the district court to withdraw the reference to bankruptcy court. 28 U.S.C. § 157(d). Creditors may also ask the court to dismiss a case or suspend all proceedings if "the interests of creditors and the debtor would be better served by such dismissal or suspension." 11 U.S.C. § 305(a)(1). We also note that the denial of Silver Sage's initial motion to dismiss the bankruptcy does not resolve the issue of bad faith in such a way that the bankruptcy court may not later dismiss the petition. If it does appear, at some time, that the City is failing to act in good faith, the bankruptcy court may dismiss the petition altogether. We are confident that the bankruptcy judges of this Circuit would be more than willing to use such a remedy if it is warranted. The threat of such a remedy, itself, may encourage the City, and other chapter 9 debtors, to act in good faith.

Silver Sage's other arguments for why we should find the denial of a motion to dismiss for bad faith a "final order" are not convincing. Silver Sage argues that the situation here is analogous to *In re Mason*, 709 F.2d 1313, (9th Cir. 1983). In *Mason*, we held that the denial of a motion to dismiss an *involuntary* chapter 7 petition was a final decision and therefore appealable as of right. *Id.* at 1316-18. We noted that in proceedings on involuntary cases, the bankruptcy rules of procedure contemplate procedures "much like [those in] any other lawsuit." *Id.* at 1317. The petition is treated like a complaint that must be answered by the debtor, discovery is available, a hearing may be held in which evidence is taken, the court must make findings of fact and conclusions of law

and a judgement is entered. *Id.* The court also found that there was a great potential for substantial harm if an involuntary petition is erroneously allowed to go forward. Upon the approval of an involuntary petition, the court has the power to appoint a trustee and liquidate the debtor's assets to pay the creditors. *Id.* The approval of an involuntary petition finally determines the debtor's rights so that addressing the issue later would not serve to prevent the debtor from suffering irreparable injury. We therefore concluded that immediate appeal was necessary.

The *Mason* case is clearly distinguishable from the case here. Whereas an order for relief is automatically granted to a municipality upon its filing of a bankruptcy petition, 11 U.S.C. § 301, before such an order is granted in an involuntary case, several procedural steps must be followed. The rights of a debtor are extraordinarily affected when an order for relief is granted in an involuntary case. In an involuntary case, an unwilling debtor is hailed into court and told to answer allegations by its creditors that their only effective relief is for the debtor to be put in bankruptcy. When the order is granted, the debtor essentially loses control of its assets. The court, or a trustee, takes control of the assets. 11 U.S.C. § 541. Without an immediate appeal, the order for relief would not be reviewable until almost all the damage is done. Here, the only "damage" the creditors suffer is having to participate in a bankruptcy process. Creditors, whether they be lenders or judgment creditors, are always subject to the risk that debtors will go into bankruptcy.

Silver Sage also argues that without an immediate appeal, Congress's civil rights statutory scheme will be undermined. In an attempt to eliminate discrimination in housing, Congress

passed the Fair Housing Act. In an attempt to allow cities to take advantage of the bankruptcy process to reorganize their debts, Congress passed Chapter 9 of the bankruptcy code. There is no evidence that Congress felt that the objectives of the former were more important than the latter. Silver Sage argues that the City's actions will have a chilling effect on civil rights litigation against cities. Bankruptcy has been available to cities since the 1930's.[4] Congress has restructured the bankruptcy act several times and has never sought to restrain cities from using bankruptcy as a tool to restructure debts incurred by civil rights judgments. Municipal bankruptcies are extremely rare when compared to the number of civil rights judgments levied against municipalities.[5] If, in the future, municipalities use chapter 9 as a way to flout Congress's will, we are confident that Congress would address the issue. We are also confident that the bankruptcy courts would dismiss chapter 9 petitions if it is clear that a municipality is abusing the process in such a manner.

Silver Sage vigorously argues that immediate appealability is necessary because this court's judgment would otherwise be flouted. Our judgments should not be flouted. The bankruptcy

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[4] The first constitutionally valid municipal bankruptcy legislation was passed in 1937. *See generally* COLLIER ON BANKRUPTCY, 15th ed. § 900.LH[3] (2001).

[5] Less than 400 chapter 9 cases have been filed in the last 60 years. *See* NORTON BANKRUPTCY LAW AND PRACTICE 2d, § 136:25 (2001). For this reason, Silver Sage's argument that not allowing an immediate appeal will adversely affect the municipal bond market is also meritless.

judges and district judges of this Circuit have no interest in seeing our judgments flouted. We believe that they would be more than able to recognize whether a party has brought a bankruptcy for the sole purpose of flouting our judgments. If it appears to the bankruptcy court that the City is, in fact, acting for the sole purpose of "flouting" our judgment, we are confident that the bankruptcy court would recognize this and sanction the City accordingly.

Finally, Silver Sage argues that Congress' will is threatened because it "uniquely required that cities prove that their bankruptcy filing is in good faith to receive the benefits of Chapter 9." Good faith, however, is a requirement of all bankruptcies and without it a bankruptcy is to be dismissed for "cause" under 11 U.S.C. § 1112(b). *E.g.*, *405 N. Bedford Dr.*, 778 F.2d at 1377

The denial of a motion to dismiss a chapter 9 bankruptcy does not irreparably injure a party so that later addressing the issue would be futile. We therefore hold that such a denial is not a final decision and cannot be immediately appealed to this court.

## CONCLUSION

The bankruptcy court's denial of Silver Sage's motion to dismiss the bankruptcy petition was not a final decision. The BAP chose not to hear an interlocutory appeal from the denial of the motion to dismiss. This exercise of discretion is not subject to our review. We therefore have no jurisdiction.

The appeal is **DISMISSED**.

## APPENDIX C

## UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

**BAP No. CC-02-1164**

**Bk. No. RS 01-30756 MJ**

**[Filed April 17, 2002]**

| | |
|---|---|
| In re: | ) |
| | ) |
| CITY OF DESERT HOT SPRINGS, | ) |
| Debtor. | ) |
| | ) |
| | ) |
| SILVER SAGE PARTNERS, LTD.; RICHARD EARLIX; ROBERT E. FILLET; PAUL SABEN; MICHAEL LINSK; EDWARD MOORE, JR.; ALBERT PIMENTAL, | ) |
| Appellants, | ) |
| | ) |
| v. | ) |
| | ) |
| CITY OF DESERT HOT SPRINGS, | ) |
| Appellee. | ) |
| | ) |

**ORDER DENYING LEAVE AND DISMISSING APPEAL**

**Before: MONTALI, PERRIS and MARLAR, Bankruptcy Judges.**

The Panel has received and considered appellants' motion for leave to appeal, the appellee's opposition and appellants' reply.

This is an appeal of the bankruptcy court's order denying the appellants' motion to dismiss the Chapter 9 bankruptcy.

This appeal does not involve a controlling question of law as to which there is a substantial ground for difference of opinion. See *In re Roderick Timber Co.*, 185 B.R. 601, 604 (9th Cir. BAP 1995). We are not persuaded that an appeal of this interlocutory order should be heard at this time.

We note that appellants complain that appellee is seeking "... to evade civil rights supervision ... under Chapter 9" (Reply, 2:13) and that they contend that the "...Ninth Circuit-mandated injunction/remedial proceedings affecting millions of people were halted by the [appellee's] bad faith bankruptcy filing." (Reply, 3:4-5). Hearing this appeal now is unnecessary for appellants to seek to vindicate their rights before the district court. Appellee has agreed to a "...modification of the automatic stay to enable all remaining proceedings...including proceedings for injunctive relief, to go forward in the district court." (*In re City of Desert Hot Springs*, Case No. CV-02-00045 CAS, Minute Order entered February 15, 2002, p. 4. (emphasis added)).

Therefore, it is ORDERED that the motion for leave to appeal is DENIED and the above appeal DISMISSED.

A certified copy of this order, sent to the bankruptcy court, shall constitute the Panel's mandate.

**CERTIFICATE OF MAILING**

The undersigned deputy clerk of the U.S. Bankruptcy Appellate Panel of the Ninth Circuit hereby certifies that a copy of the document to which this certificate is attached was mailed this date to all parties in interest as designated by the Appellant in the Notice of Appeal, to the United States Trustee and to the Clerk of the Bankruptcy Court.

/s/_____4/17/02
Deputy Clerk/Date

## APPENDIX D

**UNITED STATES BANKRUPTCY COURT**
**FOR THE CENTRAL DISTRICT OF CALIFORNIA**
**RIVERSIDE DIVISION**

**Case No. RS01-30756 DN**

**Chapter 9**

**[Filed March 12, 2002]**

HENNIGAN, BENNETT & DORMAN
James O. Johnston (SBN 167330)
Karen L. Kupetz (SBN 207494)
601 South Figueroa Street, Suite 3300
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GRAVES, ROBERSON & BOURASSA
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Telephone: (818) 707-1333
Fax: (805) 498-8111
*Litigation Counsel for the City of Desert Hot Springs*

| | |
|---|---|
| In re | ) |
| | ) |
| CITY OF DESERT HOT SPRINGS, | ) |
| Debtor. | ) |
| | ) |

**ORDER DENYING SILVER SAGE PARTNERS, LTD. ET AL.'S OBJECTION TO THE FILING OF THE BANKRUPTCY PETITION AND MOTION TO DISMISS THE BANKRUPTCY**

Hearing

Date: February 15, 2002
Time: 9:00 a.m.
Place: Hon. David N. Naugle
3420 Twelfth Street
Courtroom 304
Riverside, CA 92501

This matter coming before the Court on the "Objection To The Filing Of The Bankruptcy Petition And Motion To Dismiss The Bankruptcy" (the "Motion"), filed by Silver Sage Partners, Ltd., Richard Earlix, Robert E. Fillet, Paul Saben, Michael Linsk, and Edward Moore, Jr. (collectively, "Silver Sage"); and

The Court having reviewed and considered the Motion, the Declaration of William J. Davis in support of the Motion, the Declaration of Jean D. Carpenter in support of the Motion, the Opposition to the Motion filed by the City of

Desert Hot Springs, the Declaration of Joseph Guzzetta in support of the City's Opposition, the Declaration of Kevin Patrick McVerry in support of the City's Opposition, Silver Sage's Reply to the City's Opposition, the Declaration of William J. Davis in support of Silver Sage's Reply, the Declaration of Won Chang in support of Silver Sage's Reply, the Declaration of Jean D. Carpenter in support of Silver Sage's Reply, Silver Sage's objection to the Declaration of Joseph Guzzetta, the Notice Of Commencement Of Chapter 9 Case, Order For Relief, Deadline For Objections To Petition, And Related Matters, the Declarations of Service and Publication of all of the foregoing, and the record in the above-captioned case; and

The Court having held a hearing and heard argument on the Motion on February 15, 2002; and

The Court having made and entered findings of fact and conclusions of law as embodied in the accompanying "Findings Of Fact And Conclusions Of Law In Support Of Order Denying Silver Sage Partners, Ltd. Et Al.'s Objection To The Filing Of The Bankruptcy Petition And Motion To Dismiss The Bankruptcy";

**IT HEREBY IS ORDERED THAT**

1. The Motion is DENIED.

2. The Objection to the Declaration of Joseph Guzzetta is OVERRULED.

DATED: March 12, 2002

/s/_____
THE HONORABLE DAVID N. NAUGLE
UNITED STATES BANKRUPTCY JUDGE

**Presented by**:

HENNIGAN, BENNETT & DORMAN
601 South Figueroa Street, Suite 3300
Los Angeles, California 90017

By: _____
James O. Johnston (SBN 167330)

Counsel for the City of Desert Hot Springs

**DECLARATION OF SERVICE**

I am over the age of eighteen years and not a party to the within action. My business address is Hennigan, Bennett & Dorman, 601 South Figueroa Street, Suite 3300, Los Angelos, California 90017

On February 26, 2002, I served the following pleading:

**ORDER DENYING SILVER SAGE PARTNERS, LTD. ET AL.'S OBJECTION TO THE FILING OF THE BANKRUPTCY PETITION AND MOTION TO DISMISS THE BANKRUPTCY**

on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, with first-class postage

thereon fully prepaid, in the United States mail at Los Angeles, California addressed as follows:

See attached service list

I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in an affidavit.

I declare that I am employed in an office of a member of the bar of this Court, at whose direction the within service was made. I declare under penalty of perjury under the law of the United States of America that the foregoing is true and correct.

EXECUTED on February 26, 2002, at Los Angeles, California.

/s/_____
Donna L. Moore, Declarant

**SERVICE LIST**

**U.S. Trustee:**
Office of the U.S. Trustee
Attn: Gary Dyer, Esq.
3420 12th Street Suite 200
Riverside, CA 92501

**Attorneys for City of Desert Hot Springs:**
James O. Johnston, Esq.
Hennigan, Bennett & Dorman
601 South Figueroa Street, Suite 3300
Los Angeles, CA 90017

**Silver Sage Partners:**
Silver Sage Ltd., Edward Moore, et al.
c/o William Davis, Esq. Davis & Company
333 South Grand Ave, Suite 4070
Los Angeles, CA 90017

**Counsel to the Committee of Unsecured Creditors:**
Richard K. Diamond, Esq.
Danning, Gill, Diamond & Kollitz, LLP
2029 Century Park East, 3rd Floor
Los Angeles, CA 90067

**NOTE TO USERS OF THIS FORM**

*Physically attach this form as the last page of the proposed Order or Judgment. Do **not** file this form as a separate document*

In re CITY OF DESERT HOT SPRINGS, Chapter 9
Debtor. CASE NUMBER
RS01-30756 DN

**NOTICE OF ENTRY OF JUDGMENT OR ORDER AND CERTIFICATE OF MAILING**

TO ALL PARTIES IN INTEREST ON THE ATTACHED SERVICE LIST:

1. You are hereby notified, pursuant to Local Bankruptcy Rule 9021-1 (1)(a)(v), that a judgment or order entitled *(specify):*

**ORDER DENYING SILVER SAGE PARTNERS, LTD. ET AL.'S OBJECTION TO THE FILING OF THE BANKRUPTCY PETITION AND MOTION TO DISMISS THE BANKRUPTCY**

was entered on *(specify date):* March 13, 2002

2. I hereby certify that I mailed a copy of this notice and a true copy of the order or judgment to the persons and entities on the attached service list on (specify date): March 13, 2002

Dated: March 13, 2002

**JON D. CERETTO**
**Clerk of the Bankruptcy Court**

By:/s/ Susan B. Smith
Deputy Clerk

**SERVICE LIST**

**U.S. Trustee:**
Office of the U.S. Trustee
Attn: Gary Dyer, Esq.
3420 12th Street Suite 200
Riverside, CA 92501

**Attorneys for City of Desert Hot Springs:**
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## APPENDIX E

**UNITED STATES BANKRUPTCY COURT**
**FOR THE CENTRAL DISTRICT OF CALIFORNIA**
**RIVERSIDE DIVISION**

**Case No. RS01-30756 DN**

**Chapter 9**

**[Filed March 12, 2002]**

HENNIGAN, BENNETT & DORMAN
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Fax: (805) 498-8111
*Litigation Counsel for the City of Desert Hot Springs*

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|---|---|
| In re | ) |
| | ) |
| CITY OF DESERT HOT SPRINGS, | ) |
| Debtor. | ) |
| | ) |
| | ) |

**FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF ORDER DENYING SILVER SAGE PARTNERS, LTD. ET AL.'S OBJECTION TO THE FILING OF THE BANKRUPTCY PETITION AND MOTION TO DISMISS THE BANKRUPTCY**

Hearing

Date: February 15, 2002
Time: 9:00 a.m.
Place: Hon. David N. Naugle
3420 Twelfth Street
Courtroom 304
Riverside, CA 92501

This matter coming before the Court on the "Objection To The Filing Of The Bankruptcy Petition And Motion To Dismiss The Bankruptcy" (the "Motion"), filed by Silver Sage Partners,

Ltd., Richard Earlix, Robert E. Fillet, Paul Saben, Michael Linsk, and Edward Moore, Jr. (collectively, "Silver Sage"); and

The Court having reviewed and considered the Motion, the Declaration of William J. Davis in support of the Motion, the Declaration of Jean D. Carpenter in support of the Motion, the Opposition to the Motion filed by the City of Desert Hot Springs (the "City"), the Declaration of Joseph Guzzetta in support of the City's Opposition, the Declaration of Kevin Patrick McVerry in support of the City's Opposition, Silver Sage's Reply to the City's Opposition, the Declaration of William J. Davis in support of Silver Sage's Reply, the Declaration of Won Chang in support of Silver Sage's Reply, the Declaration of Jean D. Carpenter in support of Silver Sage's Reply, Silver Sage's objection to the Declaration of Joseph Guzzetta, the Notice Of Commencement Of Chapter 9 Case, Order For Relief, Deadline For Objections To Petition, And Related Matters, the Declarations of Service and Publication of all of the foregoing, and the record in the above-captioned case; and

The Court having held a hearing and heard argument on the Motion on February 15, 2002; and

After due deliberation and consideration of all of the foregoing, pursuant to Rules 7052 and 9014 of the Federal Rules of Bankruptcy Procedure and Local Bankruptcy Rules 7052-1 and 90211, the Court hereby makes the following findings of fact and conclusions of law in support of the accompanying "Order Denying Silver Sage Partners, Ltd. Et Al.'s Objection To The Filing Of The Bankruptcy Petition And Motion To Dismiss The Bankruptcy." All of the following findings of fact shall constitute findings of fact even if stated as conclusions of law, and all of the following conclusions of law shall constitute conclusions of law even if stated as findings of fact.

## FINDINGS OF FACT

### I. General Background Regarding the City

1. The City is a California general law city incorporated in 1963.

2. The City has approximately 16,000 residents, with a median annual household income of approximately $31,400.

3. More than forty percent of the City's residents are Hispanic, and over fifty percent of the City's residents are racial minorities.

### II. The City's Indebtedness.

#### A. The *Silver Sage* Litigation And Resulting Claims Against The City.

4. In 1991, the Silver Sage parties (with the exception of Edward Moore) sued the City for damages resulting from an alleged violation of the federal Fair Housing Act, contending that the City improperly had denied Silver Sage the necessary approvals for a proposed housing project in the City.

5. After trial in the United States District Court before the Honorable Consuelo B. Marshall, in July 1994, a jury found for Silver Sage by a general verdict and awarded damages of $3,040,439. The City subsequently filed a motion for judgment as a matter of law or, in the alternative, for a new trial. Chief Judge Marshall denied the motion for

judgment as a matter of law and for a new trial on liability. Chief Judge Marshall, however, determined the jury's damage award to be "grossly excessive," and therefore entered an order denying the City's motion for a new trial on damages, conditional on Silver Sage's acceptance of a remittitur to $388,146.20.

6. Silver Sage rejected the remittitur, and the District Court held a second trial on damages. After that second trial in 1999, the jury awarded nominal damages of $1. Silver Sage subsequently filed a motion to amend the damage award or, alternatively, for a new trial as to damages. Silver Sage also filed a motion for an injunction ordering the City to cease violating the Fair Housing Act. The District Court denied both motions, but did award Silver Sage $57,000 in attorneys' fees.

7. Silver Sage appealed to the United States Court of Appeals for the Ninth Circuit. On June 1, 2001, the Ninth Circuit filed an opinion reversing the District Court. *Silver Sage Partners, Ltd. v. City of Desert Hot Springs,* 251 F.3d 814 (9th Cir. 2001). The Ninth Circuit ordered that the jury's original damage award be reinstated, and that the District Court reconsider the amount of the award for attorneys' fees and Silver Sage's motion for an injunction. The Ninth Circuit subsequently denied the City's petition for rehearing, and the mandate was spread on November 8, 2001.

8. Silver Sage's judgment against the City is for $3,040,439. Silver Sage has calculated that, as of December 15, 2001, the amount of its judgment against the City, was $4,469,700 after accounting for postjudgment interest. Silver

Sage intends to seek several million dollars in attorneys' fees in connection with the *Silver Sage* litigation.

**B. The TRANs Settlement And Resulting Claims Against The City.**

9. In 1997, the City issued $1,415,000 in 1998 Taxable Tax and Revenue Anticipation Notes (the "TRANs"). The TRANs were short-term borrowing facility, repayable at the conclusion of the 1998 fiscal year.

10. The City was unable to repay the TRANs and defaulted on its obligations in 1998. Following litigation, the City and holders of the TRANs entered into a settlement agreement that provided for the City to repay its obligations in twelve installment payments over the course of four years, commencing on January 31, 2001.

11. Prior to the date of the City' s chapter 9 petition, the City made the first three installment payments in respect of its obligations under the settlement agreement. There remains, however, more than $1.2 million in indebtedness of the City to the TRANs holders.

**C. Other Claims.**

12. The List of Creditors filed with the City's petition under chapter 9 of the Bankruptcy Code (as described below) indicates that, in addition to Silver Sage and the twenty TRANs holders, the City has more than sixty other unsecured creditors, with individual claims of up to $125,000.

13. Silver Sage asserts that Edward Moore and a prospective class of claimants purportedly represented by Edward Moore also have and assert multimillion dollar claims against the City.

**III. The City's Financial Condition.**

14. The City's total annual revenues approximate $8.8 million. Of that amount, the City believes approximately sixty-one percent to be restricted by law to limited, specified uses (such as the provision of police and fire services, municipal code compliance measures, and the like). The City currently devotes an additional approximately nineteen percent of such revenues to public safety services. The remaining twenty percent of the City's revenues (approximately $1.76 million) is available for general government purposes and debt repayment.

15. In each of the fiscal years ending on June 30, 1995 through 1998, the City had operating deficits, which resulted in an aggregate general fund balance deficit of nearly $2.5 million.

16. As a result of a program of cost-cutting measures and a successful appeal to its residents to increase their taxes, the City was able to eliminate the deficits in the 1999 through 2001 fiscal years, in which it ran surpluses of approximately $264,000, $695,000, and $703,000, respectively.

17. The cost-cutting measures have come at a substantial price to the City and its residents. For example:

a. The City has reduced its staff from approximately sixty people in 1999 to thirty-eight people currently. Included among this reduction were seven sworn police positions, five of which were reduced in the past year.

b. The City has discontinued street sweeping services and all recreation programs for its residents (other than the part-time operation of a swimming pool during the hottest summer months).

c. The City has reduced its public works crew from fourteen to four persons.

d. The City has been unable to conduct repair work on its streets, which it believed to be in need of $11 million in repairs as long ago as 1996.

e. The City believes that it does not maintain a prudent level of reserves for future contingencies.

f. The City has delayed opening a second fire station that it estimates would cost approximately $900,000 to operate annually. The City believes that this second facility is needed urgently to meet the needs of its residents.

18. Despite the cost-cutting measures, the City's independent financial auditors have included "financial

condition/going concern" qualifications in each of the City's last four fiscal year audit reports.

19. In light of all of the foregoing, the City is now unable to pay its debts as they become due. Among other things, the City is and will be unable to pay its obligations in respect of the judgment in the *Silver Sage* litigation as and when it becomes due.

**IV. The City's Preparation For And Commencement Of The Chapter 9 Case.**

20. After the Ninth Circuit's decision in the *Silver Sage* matter, the City began the process of assessing its options for negotiating an adjustment of its indebtedness, which had increased to a level that it believed it could not satisfy.

21. In assessing those options, the City believed that prior history with respect to Silver Sage's efforts to collect from the City would impact upon any discussions had with Silver Sage. That history is summarized as follows:

a. In January 1995, before Chief Judge Marshall ordered a new trial on the issue of damages and when the original jury verdict was outstanding, Silver Sage served a writ of execution upon the City's bank, thereby freezing funds that the City used for payroll, utilities, insurance premiums for workers compensation, and other City services.

b. Because the City believed that writ to be illegal and because the freeze on funds precluded access to funds that the City believed to be necessary to critical City operations, the City sought an emergency order from the District Court to quash the writ.

c. The District Court quashed the writ pursuant to an order dated January 10, 1995, and ordered Silver Sage to show cause why it should not be sanctioned. Following Silver Sage's response to the order to show cause, the District Court entered an additional order sustaining its order quashing the writ.

22. Given this history of aggressive, disruptive, and (in the City's opinion) illegal collection activities, the City was apprehensive of attempting to conduct workout negotiations with Silver Sage without some assurance that Silver Sage would not seek to freeze City funds again in an attempt to collect the newly-reinstated judgment. On November 12, 2001, counsel for the City wrote to counsel for Silver Sage and requested that Silver Sage confirm that it would not again attempt to levy on City bank accounts. Counsel for Silver Sage wrote back a week later with a denial and the following demand of the City: "Accordingly, the City's obligation is to pay the judgment with interest in full now. If you do not immediately advise me that your client is making arrangements to do so upon an imminent basis, then we will commence the collection process."

23. The City thereafter filed a Motion seeking an order from the District Court that would prohibit the illegal collection of the *Silver Sage* judgment, and a hearing on that Motion was scheduled for January 7, 2002. Silver Sage responded by way of a faxed letter to counsel for the City, dated December 5, 2001, that concluded as follows: "We must hear from you by the close of business Friday, December 7, 2001, as to the City's willingness to immediately pay this judgment. If we do not, we will be forced to initiate further collection action(s) at the City's expense via motion or other legal process."

24. The City therefore sought *ex parte* relief from the District Court, seeking an order that would temporarily prohibit Silver Sage from levying on City bank accounts prior to the scheduled hearing on January 7, 2002. Silver Sage again responded via faxed correspondence to counsel for the City, offering a proposal by which it would agree not to take action to collect the judgment prior to January 7, 2002, if the City met certain conditions, including that the City agree that the District Court "may order that it promptly pay the judgment (with interest as calculated [by Silver Sage])," that the City propose by no later than January 2, 2002, "a plan to pay the judgment and any attorney's fees judgment promptly," that the City agree "that it will make no expenditure not in the regular course of business" prior to January 7, 2002, and that the City agree that "the payment of any item during this period that is disputed as not being in the course of business may not be relied upon by the City to try to justify its not paying either the judgment or the interest upon the judgment." Silver Sage imposed a deadline of less than twenty-four hours for a response.

25. The City did not believe that it would be possible, prudent, or in the best interests of its creditors or residents for it to meet the conditions proposed by Silver Sage, and the City did not agree to those conditions.

26. Thereafter, the District Court entered a minute order denying, without explanation, the City's ex *parte* request for temporary relief through the date of the January 7 hearing on its motion.

27. At that time, faced with Silver Sage's past execution on City bank accounts and threats to "commence the collection process" immediately, any negotiation with Silver Sage regarding a plan to adjust the City's debts was impracticable. The City reasonably believed that negotiations with Silver Sage posed a realistic threat of dissipation of the City's assets and prejudice to the City's operations, residents, and creditors.

28. Also, due to Silver Sage's past execution on City bank accounts and threats to "commence the collection process" immediately, the City reasonably believed that Silver Sage would attempt to obtain a transfer that would be avoidable under section 547 of the Bankruptcy Code.

29. On December 19, 2001, the City filed a voluntary petition under chapter 9 of the Bankruptcy Code. The City commenced the chapter 9 case in good faith, with a desire to effect a plan to adjust its debts, and for a purpose of achieving objectives within the legitimate scope of the bankruptcy laws. Among other things, the City filed the bankruptcy case in order to prevent the piecemeal dissipation

of its assets while it could work out a plan to adjust its debts and to continue to provide essential services to its residents.

30. It was not bad faith for the City to commence a Chapter 9 bankruptcy case in order to adjust debts that included claims arising from the *Silver Sage* litigation. In light of the City's belief that there does not exist additional general-fund revenues that it can generate and Silver Sage's demands for immediate payment and threats to execute on City property, it also was not bad faith for the City to commence the Chapter 9 case before attempting to further increase its taxes or generate other revenues.

31. Furthermore, dismissal or abstention of the City's chapter 9 case would not serve the interests of the City or of creditors of the City because, among other things, it would leave the City with substantial indebtedness that it cannot satisfy and the threat of immediate collection of the *Silver Sage* judgment, to the detriment of the City's other creditors and the City's ability to continue to provide important services to its residents.

**V. Notice.**

32. The notice given of the commencement of the City's chapter 9 case, the entry of the order for relief under Chapter 9, and of the time for filing objections to the City's Chapter 9 petition satisfied the requirements of section 923 of the Bankruptcy Code and constituted due, timely, sufficient and adequate notice under the Bankruptcy Code, the Bankruptcy Rules, the local rules of this Court, and all other applicable laws, rules and regulations.

## CONCLUSIONS OF LAW

1. The Court has jurisdiction over this matter pursuant 28 U.S.C. §§ 157(b) and 1334(a). This is a core proceeding within the meaning of 28 U.S.C. § 157(b). Venue of these proceedings in this District is appropriate pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The City is a "municipality" within the meaning of section 101(40) of the Bankruptcy Code.

3. The City, in its capacity as a municipality, is specifically authorized by the laws of the State of California to be a debtor under chapter 9 of the Bankruptcy Code. Sections 43739 and 53760 of the California Government Code provide such authorization.

4. The City is "insolvent" within the meaning of section 101(32)(C) of the Bankruptcy Code because, as of the bankruptcy petition date and currently, the City is unable to pay its debts as they become due.

5. The City desires to effect a plan to adjust its debts.

6. The City satisfied the requirements of section 109(c)(5)(C) of the Bankruptcy Code because, in light of Silver Sage's past execution on City bank accounts and threats to "commence the collection process" immediately, any negotiation with Silver Sage regarding a plan to adjust the City's debts was "impracticable" within the meaning of that statute.

7. The City satisfied the requirements of section I09(c)(5)(D) of the Bankruptcy Code because, in light of Silver Sage's past execution on City bank accounts and threats to "commence the collection process" immediately, the City reasonably believed that Silver Sage would attempt to obtain a transfer that is avoidable under section 547 of the Bankruptcy Code.

8. In light of the conclusions set forth in Conclusions 2 through 7, above, the City has satisfied its burden of establishing eligibility to be a debtor under Chapter 9 of the Bankruptcy Code pursuant to sections 109(c) and 921(c) of the Bankruptcy Code.

9. The City filed its chapter 9 petition in "good faith" within the meaning of section 921(c) of the Bankruptcy Code. The Court also hereby exercises its discretion not to dismiss the City's chapter 9 petition under section 921 (c).

10. Section 305(a) of the Bankruptcy Code does not apply to the City's chapter 9 case because section 305 is not made applicable to chapter 9 cases by sections 103(f) or 901(a) of the Bankruptcy Code. Even if section 305(a) were applicable to the City's chapter 9 case, the Court would and hereby does exercise its discretion not to dismiss, suspend, or abstain from hearing the chapter 9 case under such statute.

11. 28 U.S.C. § 1334(c) does not apply to Silver Sage's Motion for dismissal or abstention from the chapter 9 case in its entirety because the provisions of section 1334(c) relate only to "a particular proceeding arising under title 11 or arising in or related to a case under title 11." Even if 28 U.S.C. § 1334(c) were applicable, the Court would and

hereby does exercise its discretion not to dismiss, suspend, or abstain from hearing the City's chapter 9 case under such provision.

12. Silver Sage's request for attorneys' fees and sanctions against the City and its counsel is not well founded in law and is not appropriate because Silver Sage did not prevail with respect to its Motion and because the City filed the chapter 9 case in good faith. The Court hereby exercises its discretion not to award fees or sanctions to Silver Sage.

13. Silver Sage's Objection to the Declaration of Joseph Guzzetta is not well founded in law. The Court hereby exercises its discretion to consider that Declaration in the context of heating and determining the Motion.

**DATED:** March 12, 2002

/s/ David N. Naugle
THE HONORABLE DAVID N NAUGLE
UNITED STATES BANKRUPTCY JUDGE

**Presented by:**

HENNIGAN, BENNETT & DORMAN
601 South Figueroa Street, Suite 3300
Los Angeles, California 90017

By: /s/ James O. Johnston
Counsel for the City of Desert Hot Springs

**DECLARATION OF SERVICE**

I am over the age of eighteen years and not a party to the within action. My business address is Hennigan, Bennett & Dorman, 601 South Figueroa Street, Suite 3300, Los Angeles, California 90017.

On February 7, 2002, I served the following pleading:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF ORDER DENYING SILVER SAGE PARTNERS, LTD. ET AL.'S OBJECTION TO THE FILING OF THE BANKRUPTCY PETITION AND MOTION TO DISMISS THE BANKRUPTCY**

on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, with first-class postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as follows:

See attached service list

I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California. I am readily familiar with the firm' s practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in an affidavit.

I declare that I am employed in an office of a member of the bar of this Court, at whose direction the within service was made. I declare under penalty of perjury under the law of the United States of America that the foregoing is true and correct.

EXECUTED on February 26, 2002, at Los Angeles, California.

/s/ Donna L. Moore
Declarant

**SERVICE LIST**

**U.S. Trustee:**
Office of the U.S. Trustee
Attn: Gary Dyer, Esq.
3420 12th Street Suite 200
Riverside, CA 92501

**Attorneys for City of Desert Hot Springs:**
James O. Johnston, Esq.
Hennigan, Bennett & Dorman
601 South Figueroa Street, Suite 3300
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**Silver Sage Partners:**
Silver Sage Ltd., Edward Moore, et al.
c/o William Davis, Esq. Davis & Company
333 South Grand Ave, Suite 4070
Los Angeles, CA 90017

**Counsel to the Committee of Unsecured Creditors:**
Richard K. Diamond, Esq.
Danning, Gill, Diamond & Kollitz, LLP
2029 Century Park East, 3rd Floor
Los Angeles, CA 90067

**NOTE TO USERS OF THIS FORM**

*Physically attach this form as the last page of the proposed Order or Judgment. Do **not** file this form as a separate document*

In re CITY OF DESERT HOT SPRINGS, Chapter 9
Debtor. CASE NUMBER
RS01-30756 DN

**NOTICE OF ENTRY OF JUDGMENT OR ORDER AND CERTIFICATE OF MAILING**

TO ALL PARTIES IN INTEREST ON THE ATTACHED SERVICE LIST:

1. You are hereby notified, pursuant to Local Bankruptcy Rule 9021-1 (1)(a)(v), that a judgment or order entitled *(specify):*

**FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF ORDER DENYING SILVER SAGE PARTNERS, LTD. ET AL.'S OBJECTION TO THE FINDING OF THE BANKRUPTCY PETITION AND MOTION TO DISMISS THE BANKRUPTCY**

was entered on *(specify date):* March 13, 2002

2. I hereby certify that I mailed a copy of this notice and a true copy of the order or judgment to the persons and entities on the attached service list on (specify date): March 13, 2002

Dated: March 13, 2002

**JON D. CERETTO**
**Clerk of the Bankruptcy Court**

By:/s/ Susan B. Smith
Deputy Clerk

**SERVICE LIST**

**U.S. Trustee:**
Office of the U.S. Trustee
Attn: Gary Dyer, Esq.
3420 12th Street Suite 200
Riverside, CA 92501

**Attorneys for City of Desert Hot Springs:**
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2029 Century Park East, 3rd Floor
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## APPENDIX F

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**Nos. 99-56917, 99-56919, 99-56920**

**[Filed June 1, 2001]**

| | |
|---|---|
| SILVER SAGE PARTNERS, LTD., | ) |
| ROBERT E. FILLET, PAUL SABEN, | ) |
| RICHARD L. EARLIX, | ) |
| MICHAEL S. LINSK, | ) |
| Plaintiffs-Appellants, | ) |
| v. | ) |
| | ) |
| CITY OF DESERT HOT SPRINGS, | ) |
| DESERT HOT SPRINGS CITY COUNCIL, | ) |
| JOHN ISAACS, Mayor, DANIEL BEEN, | ) |
| MIKE SEGRIST, SUE WOOD, | ) |
| Defendants-Appellees. | ) |
| | ) |

Appeal from the United States District Court
for the Central District of California
D.C. No. CV-91-06804-CBM
Consuelo B. Marshall, District Judge, Presiding

This Opinion Substituted by the Court for Withdrawn Opinion of May 21, 2001, Previously Reported at: 2001 U.S. App. LEXIS 10471.

**JUDGES**

Before: Procter Hug, Jr. and Betty B. Fletcher, Circuit Judges, and Susan Y. Illston*, District Judge. Opinion by Judge B. Fletcher.

## ORDER

The opinion filed on May 21, 2001 is withdrawn.

## OPINION

B. FLETCHER, Circuit Judge:

We must decide whether a jury's award of damages in the amount of $3,040,439 was against the clear weight of the evidence. Because we conclude that it was not, we reverse and remand with instructions that the jury's verdict be reinstated. We must also decide whether plaintiffs who have established a defendant's liability under the Fair Housing Act must demonstrate a reasonable likelihood of future violations of the Act in order to be entitled to injunctive relief under the Act. We conclude that they need not and so reverse and remand for reconsideration.

## BACKGROUND

Silver Sage Partnership, Ltd. (the partnership or Silver Sage) is a partnership organized to purchase and develop low-income housing at a mobile home park in the City of Desert

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* The Honorable Susan Y. Illston, United States District Judge for the Northern District of California, sitting by designation.

Hot Springs, California (the city). Paul Saben and Richard Earlix were the partnership's principals. In 1990, the partnership entered into an agreement with Huntington Savings and Loan to purchase the Silver Sage Mobile Home Park, which was located in the city.[1] The partnership initially sought to finance the project with bonds to be issued by Riverside County. Although the county approved a bond resolution for that purpose, it required the consent of the city, which the city would not give.

The partnership next tried to obtain financing from the state of California, believing that state financing would not require city approval. Because it planned to develop low-income housing, the California Tax Credit Allocation Committee agreed to provide the partnership tax credits in the amount of $8,248,370. For the same reason, the partnership was able to obtain a commitment for a favorable fifty-five year mortgage in the amount of $4,233,265 from the California Housing Department (CHD) under its Rental Housing Construction Program (RHCP). The involvement of CHD triggered the application of Article XXXIV of California's Constitution. That provision requires local voter approval of any low-rent housing projects that are "developed, constructed, or acquired" by a "state public body." CAL .CONST. art. XXXIV, § 1. On December 18,

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[1] Huntington Savings and Loan went into receivership. On June 30, 1991, the Resolution Trust Corporation (RTC) entered into a "purchase and sale agreement" with the partnership, affirming the original purchase contract.

1990, the city council voted to deny Article XXXIV approval to the partnership's development.[2]

After further attempts to persuade the city to change its mind failed, plaintiffs brought suit under 42 U.S.C. § 3613(a), alleging a violation of section 3604 of the Fair Housing Act.[3]

After trial, the jury found for plaintiffs by general verdict and awarded them damages in the amount of $3,040,439. The city filed a motion for judgment as a matter of law or, in the

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[2] Prior to bringing suit in federal court, the partnership sought a "writ of mandate," in state court to compel the city to grant approval under Article XXXIV. The state trial court denied issuance of the writ and the partnership appealed. While plaintiffs' federal case was pending, the California Court of Appeal held in an unpublished opinion that" the power to approve or disapprove low-rent housing projects under article XXXIV is reserved for the voters in the community and cannot be delegated to the city council." However, the partnership could not take advantage of the ruling by seeking a referendum on its project because by the time the court of appeals ruled, the RHCP program had exhausted its funds.

[3] In addition to the city, plaintiffs also sued the City Council for the City of Desert Hot Springs as well as many persons in their official and individual capacity. By the time of trial, the district court had either dismissed or summarily adjudicated all claims against the individual defendants. Plaintiffs do not appeal from those decisions. Plaintiffs also brought various state law claims and a claim under 42 U.S.C. § 1983. The district court either dismissed or summarily adjudicated these claims. Plaintiffs do not appeal those decisions.

alternative, a new trial. The district court denied the motion for a judgment as a matter of law and denied the motion for a new trial as to liability. However, because it found the jury's verdict "grossly excessive," the district court denied the city's motion for a new trial on the issue of damages conditional on plaintiffs' acceptance of a remittitur to $388,146.20.

Plaintiffs rejected the remittitur and a second trial on damages was held. After trial, the second jury awarded nominal damages for plaintiffs. After entry of judgment, plaintiffs filed a motion seeking to have the district court "amend" the second jury's damage award or, in the alternative, for a new trial as to damages. Plaintiffs also sought an injunction ordering the city to cease violating the Fair Housing Act. The district court denied both motions. However, the district court did grant plaintiffs' motion to reconsider its previous denial of attorney's fees. The district court decided that since plaintiffs had established the city's liability but had only obtained nominal damages from the jury, it would award plaintiffs $57,000 in attorney's fees. Plaintiffs now appeal (1) the district court's order granting a new trial on damages because of plaintiffs' refusal to accept the remittitur, (2) the district court's denial of their motion to amend the second jury verdict or order a new trial on damages, (3) the district court's denial of injunctive relief, and (4) the amount of the district court's award of attorney's fees.[4] We have jurisdiction under 28 U.S.C. § 1291.

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[4] The city initially appealed the district court's award of attorney's fees, but it has abandoned its appeal.

## DISCUSSION

### A. Remittitur/New Trial

#### i. Standard of Review

We review a district court's grant of a new trial for an abuse of discretion. *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1139 (9th Cir. 1999). We conclude that the same standard of review is appropriate here, where a plaintiff rejects the remittitur and a second trial is held, for the outcome is the same in both cases--the district court overrides the jury's verdict. *Cf. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279, 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989) (holding that court of appeals should review for an abuse of discretion district court's denial of new trial for punitive damages conditional on plaintiff's acceptance of remittitur).

Under the abuse of discretion standard, even if substantial evidence supports the jury's verdict, a trial court may grant a new trial if "the verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial court, a miscarriage of justice." 4.0 *Acres of Land*, 175 F.3d at 1139 (internal quotation marks and citation omitted). We will uphold a district court's grant of a new trial if any of its grounds for granting the new trial are reasonable. *Id.* However, a district court may not grant a new trial simply because it would have arrived at a different verdict. *Id.* Thus if the jury's verdict is not against the clear weight of the evidence, we may find that a district court abused its discretion in granting a new trial. *Id.*

The proper interpretation of a federal statute is a question of law that we review de novo. *U.S. v. Stephens*, 237 F.3d 1031, 1033 (9th Cir. 2001).

**ii. Analysis**

The jury granted plaintiffs an award of $3,040,439 in damages. The jury's award was not against the clear weight of the evidence. The district court therefore abused its discretion in requiring plaintiffs to choose between a new trial and a remittitur.

Plaintiffs' damages expert (the expert) testified that the city's failure to approve the project cost plaintiffs $4,587,679 in damages. The district court found that some of the losses considered by the expert in calculating plaintiffs' damages (a) included lost profits which were too speculative, (b) failed to account for anticipated costs and an anticipated return, (c) included losses to individuals who were only marginally affected by the city's discriminatory practices, (d) included losses due to a purely speculative tax increase and (e) double counted the partnership's losses. Deducting these losses from the expert's total, the court concluded that the most that plaintiffs could claim was $1,847,067.20. However, the district court found that even an award in this amount would be "grossly excessive," because Silver Sage failed to mitigate its damages. Relying on a feasibility study Saben conducted in September 1989 for Huntington Savings and Loan, then the owner of the Silver Sage Mobile Home Park, the district court concluded that the partnership could have developed the project "as a market rate mobile home park and sold it for $1,458,918 after rent up." Deducting this from the amount it determined was the maximum losses Silver Sage suffered, the

district court concluded that the city was liable for no more than $388,146.20. The district court denied the city's motion for a new trial on damages, conditional on plaintiffs' acceptance of a remittitur to $388,146.20. Plaintiffs argue that the district court's order was an abuse of its discretion. Plaintiffs' argument has merit.

**a. "Speculative" Lost Profits**

The district court objected to various alleged losses because it found them "too speculative." The court stated that the expert testified that project income "must be used first for operating expenses, then to pay the management fee, then to pay interest on the loan from the State of California, then to pay principal on that loan and only then would Silver Sage partners receive any remaining profit." The court also claimed that the expert testified that his calculation of damages assumed that Silver Sage would pay its loan obligation in full each year for fifty-five years. In addition, according to the court, Saben, one of the project's developers, testified both in court and before the city council that "he did not consider the loan from the State of California an obligation that had to be repaid [and that] the Silver Sage partnership's projected income stream would never be sufficient to pay much if any of the principal or interest on that loan." The court characterized Saben's testimony as uncontroverted by any other evidence presented at trial. Because it found that the evidence showed that neither the principal nor the interest on the loan would be paid off and that the partnership could receive profit only after the loan was paid, the district court concluded that the expert's projected profits were too speculative. It therefore deducted

them from the jury's award in calculating the value of the remittitur.

Plaintiffs dispute the district court's characterization of the evidence. They are right to do so. The district court mischaracterizes the expert's and Saben's testimony. The district court was correct to note that the expert's damages calculations assumed payment on the loan each year. However, the court claimed that Saben testified that the project's projected income stream "would never be sufficient to pay much if any of the principal or interest on the loan." In support of this claim, the court cites Saben's comments to the city council and his trial testimony. While Saben did express some doubts before the city council about Silver Sage's ability to make payments on the loan,[5] his trial testimony is consistent with the expert's assumption that the partnership would make payments on the loan each year. After establishing that Saben had made projections concerning loan repayments, plaintiffs' counsel asked Saben what the projections showed. Saben replied: "Projections showed, by the end of the fifteenth year, the payment on the loan would have just about reached the amount of the annual interest, and subsequently, there would have been some principal

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[5] Saben testified as follows concerning his comments before the city council:

> Q [by defense counsel]: Sir, isn't it true that you told the City Council that your calculations showed there is no way that-- because of the low rents--there is no way that there's going to be very much payment made on those loans? A [by Saben]: I did say that.

payments, beginning in the years after the fifteenth."[6] This testimony in no way supports the district court's claim that Saben testified that project income "would never be sufficient

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[6] Saben's projections are in some ways more optimistic than the expert's, since the expert did not anticipate payment on the principal until the thirty-third year of operation. It is unclear to what extent Saben's projections and the expert's calculations would lead to different assessments of Silver Sage's lost profits. However, the mere fact that different assessments are possible is not a reason for excluding the lost profits as "too speculative." *See Samaritan Inns, Inc. v. District of Columbia*, 325 U.S. App. D.C. 19, 114 F.3d 1227, 1235 (D.C. Cir. 1997) (stating that, in action under the Fair Housing Act, "while a plaintiff seeking to recover lost profits must ordinarily prove the fact of injury with reasonable certainty, proof of the amount of damages may be based on a reasonable estimate"); *see also Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 75 L. Ed. 544, 51 S. Ct. 248 (1931) ("Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.").

to pay much if any of the principal or interest on the loan."[7]

The district court also claimed that the expert testified that the partners would receive profits only after "payment in full of interest and principal." The district court cites to two passages from the expert's testimony to support its claim. The first passage directly conflicts with the court's characterization. In it, the expert states that in any year in which operating income exceeds operating expenses--including the debt service due that year--some of the excess income would go to the partnership.[8] This testimony is fully

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[7] It is true, as the district court suggests, that Saben testified that the partnership did not have a legal obligation to pay back the loan. Saben testified, for example, that "there were no requirements of any payments of the principal or interest be made for fifty-five years. No foreclosure for nonpayment of either principal or interest." However, this statement is not evidence that Silver Sage would not have made payments on the loan. If, as the expert testified and stated in his report, the partnership could realize profits in any year only after paying off the interest accrued through that year, see infra, then the partnership would be motivated to make payments whether or not it was legally obligated to do so. In any case, Saben's testimony that the partnership was not obligated to pay off the loan is not inconsistent with his testimony concerning his projections for loan repayments.

[8] The expert testified:

> The arrangement with the state had a provision that, after the operating expenses, which include the, if you will, management fee from the partnership to run the facility, and after the debt service, principal and interest payments per the 55-year schedule were paid. If there were

consistent with the expert's report, which was introduced into evidence, which states that, pursuant to state regulations, the partnership would receive some profits in any year that operating income exceeds payment on the loan, including payment for any accrued interest balance. The second passage the district court cites merely confirms that if the partnership failed to make payments on its loan, its profits would be reduced.[9]

No evidence supports the district court's finding that the partnership would realize profits only after the entire loan obligation was repaid. While Saben's comments before the

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> remaining funds, those funds would be available to the partnership.

(emphasis added).

[9] Defense counsel asked the expert to review the minutes of the December 18, 1990 city council meeting. The following colloquy ensued:

> Q [by defense counsel]: ... Do you see where Mr. Saben has indicated to the council that there would be no way, that because of the low rents, that there is going to be, very much, payments made on these loans; there will be some payments made. Do you see that?
> ...
> A [by the expert]: I do ...
>
> Q: ... If the loans are not paid back, do you agree that the sale proceeds that would go to the Silver Sage Partners would be reduced?
> A: Yes.

city council would appear to indicate a concern about whether the project would be able to pay its loan obligations, Saben's trial testimony is fully consistent with the expert's assumption that the project would make annual mortgage payments. We therefore conclude that a jury verdict that included damages for lost profits based on the expert's calculations would not be against the clear weight of the evidence and that the district court's exclusion of these damages was an abuse of discretion.

**b. "Anticipated" Costs and Return**

The district court also faulted the expert's calculation of Silver Sage's lost profits because it failed to take into account certain costs which, the court claimed, the partnership "would have been obligated to pay" had the project gone forward. The court stated that Silver Sage "promised to pay $125,000 for state-mandated child care facilities" and" to pay an additional $258,000 for temporary classrooms." The court therefore deducted these amounts from the jury verdict in calculating the remittitur amount. In support of this finding, the district court cited a memorandum written by Saben and Earlix. The memorandum clearly expresses Silver Sage's plan to create a child care facility. However, there is no evidence that this expression of intention created a binding obligation on the partnership. Nor does the city point to any evidence in the record that the creation of a child care facility is mandated by state law. Similarly, the city fails to identify any evidence that the partnership was legally obligated to pay anything for the creation of temporary classrooms.

Because no evidence supports the district court's finding that Silver Sage would have been obligated to pay for the child care facilities and for the temporary classrooms had the

project gone forward, a jury verdict that did not exclude these amounts would not be against the clear weight of the evidence. The district court's exclusion of these amounts was an abuse of discretion.

The district court also objected to the expert's calculation of the partnership's out-of-pocket expenses. Among those expenses, the expert counted $34,991 in an escrow account held by the RTC. The escrow account contained earnest money for the purchase of the project. The court noted that the expert included the amount in escrow in the event that none of it was returned by the RTC and that the expert testified that he had no information as to whether the RTC would return it. Because "no evidence indicated that [the RTC] would not" return the escrow funds, the court concluded that the possibility that the RTC would not return the funds was "too speculative to be included in the Partnership's damages." The court therefore excluded the escrow funds from its remittitur calculations.

However, as Silver Sage points out, the purchase and sale agreement--which was entered into evidence--explicitly states that the funds in the escrow account "were to be treated as liquidated damages and forfeited to Seller if the transaction was not consummated,"[10] A jury damages award that included the $34,991 in the RTC escrow account is not against the clear weight of the evidence. We therefore hold that the district court abused its discretion in excluding this amount in its remittitur calculations.

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[10] Plaintiffs also correctly note that Saben testified that the RTC did not return the earnest money to them.

**c. "Marginally Affected" Individuals**

The district court objected to the inclusion as part of plaintiffs' damages of a commission that would have been payable to Michael Linsk, a real estate broker, had the purchase of the project gone through, and to a syndication fee that would have been payable to Robert Fillet. The court held that the Fair Housing Act "does not entitle all persons however marginally affected by discriminatory practices to recover for all attenuated harm suffered." It concluded that the harms suffered by Linsk and Fillet were too attenuated.[11] The court thus excluded both Linsk's commission and Fillet's syndication fee from the damages that plaintiffs could recover.

Plaintiffs argue that the district court improperly narrowed the remedies available under the Fair Housing Act. We agree. In *San Pedro Hotel Co. v. City of Los Angeles*, 159 F.3d 470 (9th Cir. 1998), we noted that

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[11] The district court questioned" whether Linsk has standing to maintain this suit" but did not rule on the issue. A party's standing is a condition of our subject matter jurisdiction. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC)*, Inc., 528 U.S. 167, 180, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000) (stating that standing is a jurisdictional requirement of Article III). We therefore address the issue and conclude, as discussed below, that Linsk does have standing to bring a claim under the Fair Housing Act. *See Hernandez v. Campbell*, 204 F.3d 861, 865 (9th Cir. 2000) ("Federal courts are always under an independent obligation to examine their own jurisdiction." (internal quotation marks and citation omitted)).

> the Supreme Court has long held that claims brought under the [Fair Housing] Act are to be judged under a very liberal standing requirement. ... The sole requirement for standing under the Act is the Article III minima of injury in fact. To meet this requirement, a plaintiff need only allege that as a result of the defendant's discriminatory conduct he has suffered a distinct and palpable injury. Thus, under the Act, any person harmed by discrimination, whether or not the target of discrimination, can sue to recover for his or her own injury. This is true, for example, even where no housing has actually been denied to persons protected under the Act.

159 F.3d at 475 (internal quotation marks, citations, and brackets omitted). The district court did not find that Linsk and Fillet had not lost their respective commission and syndication fee because of the city's discrimination. Rather, it held only that their injuries are too attenuated to merit recovery. Linsk and Fillet adequately plead injury in fact as a result of the city's discriminatory action. The jury found that the city had violated the Fair Housing Act and awarded plaintiffs damages. Linsk and Fillet therefore had a right under the Act to recover for their injuries. *Cf. Crumble v. Blumthal*, 549 F.2d 462, 465, 468-69 (7th Cir. 1977) (holding that district court abused its discretion in denying real estate brokers' motion to intervene in case brought under the Fair Housing Act, where brokers alleged that defendant-sellers promised to pay commission on sale, but where sellers refused to perform on their contract to sell because of the buyer's race).

In excluding Linsk's commission and Fillet's syndication fee from the damages plaintiffs could claim, the court committed legal error.

**d. Loss from Potential Tax Increase**

At the time the expert calculated plaintiffs' damages, it was predicted that then-President-elect Clinton would propose an increase in the highest marginal tax rate from thirty-one to thirty-six percent and would propose a ten percent surcharge on incomes exceeding one million dollars. The expert concluded that the developer and syndicator fees that some of the plaintiffs were seeking as damages would be subject to the expected tax increase. Had the city not stopped the project, the fees would have been subject to the lower marginal tax. The expert calculated the taxes that the plaintiffs would have to pay on the fees under the proposed changes and included as damages the difference between this and the amount that would be owed under the current tax scheme.

The court excluded the tax damages in part because the loss was too speculative. The district court was correct to exclude the tax damages for this reason. At the time the expert prepared his damages calculations, it was merely speculative whether the tax rate would be changed in the manner he assumed. Although compensatory damages need not be determined with certainty, they may not be based upon" mere speculation or guess." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 75 L. Ed. 544, 51 S. Ct. 248 (1931).

The district court did not abuse its discretion in excluding the damages for increase in tax from its calculation of the damage award to which plaintiffs were entitled.

**e. Mitigation**

After the various adjustments, the district court calculated that the maximum amount of damages that plaintiffs could have claimed was $1,847,067.20. Relying on *Herrington v. County of Sonoma*, 834 F.2d 1488 (9th Cir. 1988), the court concluded that an award of even this much would be grossly excessive because Silver Sage had not attempted to mitigate its damages.

Specifically, the court found that in September 1989, Saben conducted a feasibility study in which he concluded that the project "could be developed as a market rate mobile home park and sold for $1,458,918 after rent up."[12] Because the partnership failed to purchase the property and develop it as a market rate mobile home park, the district court concluded that it failed properly to mitigate its damages. It therefore deducted $ 1,458,918 from $1,847,067.20, the maximum it had previously concluded plaintiffs could claim, and held that the city was liable for no more than $388,146.20.

In *Herrington*, plaintiffs brought a § 1983 action in which the county rejected the plaintiff-landowners' subdivision application and subsequently "downzoned" the area in which the plaintiffs' land was located. The district court granted

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[12] Saben conducted the 1989 study for Huntington Savings and Loan, at the time the owner of the Silver Sage Mobile Home Park.

injunctive relief and the jury awarded 2.5 million dollars in damages. *Id.* at 1490-91. We vacated the damages award, in part, because we concluded that the award compensated the plaintiffs for a complete deprivation of the development potential of their property. However, because the court declared the county's decision invalid, the plaintiffs regained the ability to develop their property. Thus, we concluded that because the award was based on an assumption that the plaintiffs suffered a complete deprivation of development rights, it was excessive. *Id.* at 1503-06.

Plaintiffs argue that *Herrington* has no application to their case because, unlike the plaintiffs in *Herrington*, they do not own the property at issue. The district court recognized that the partnership did not own the property. Nonetheless, it concluded that because there was evidence that the partnership could still purchase and develop the property as a" market rate" enterprise, it had a duty to do so. The court provided no legal authority to support the proposition that a party harmed by another's violation of the Fair Housing Act has a duty to mitigate its damages.

Assuming without deciding that Fair Housing plaintiffs such as the partnership have a duty to mitigate damages, that duty requires the plaintiff to do no more than is reasonable to avoid damages. *See* RESTATEMENT (SECOND) OF TORTS: AVOIDABLE CONSEQUENCES § 918(1).[13] The

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[13] Section 918 states

> (1) Except as stated in Subsection (2), one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable

partnership planned to purchase the mobile home park by using a combination of state tax credits and a favorable mortgage from the RHCP. The partnership was able to obtain the RHCP mortgage because it was going to develop the project as low-and very low-income housing. When the city denied approval, the partnership no longer had access to the RHCP loan.[14] Even if we ignore the fact that by the time the city disapproved of the project, the partnership was having financial difficulties, it is simply not reasonable to expect the partnership to have mitigated damages by purchasing the property without the benefit of the favorable RHCP mortgage. Indeed, there is absolutely no evidence in the record that the partnership had available any other source of financing for purchasing the project.

*Herrington* has no bearing on this case. Even assuming that the partnership had a duty to mitigate its damages, purchasing the mobile home park without the benefit of the RHCP mortgage was not a reasonable option. The district

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effort or expenditure after the commission of the tort.
(2) One is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended the harm or was aware of it and was recklessly disregardful of it, unless the injured person with knowledge of the danger of the harm intentionally or heedlessly failed to protect his own interests. RESTATEMENT (SECOND) TORTS § 918 (emphasis added).

[14] The district court states that Saben testified that the partnership "did not pursue any other options because the Rental Housing Construction Program had decided--before the City Council had denied ...approval--not to provide funds to the project." This mischaracterizes Saben's testimony.

court abused its discretion in excluding the $1,458,918 from the damages plaintiffs could have claimed.

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We have concluded that the district court was correct to exclude the $118,982 potential loss from the predicted tax increase as too speculative, but that the court either abused its discretion or committed an error of law in excluding the other claimed damages. What remains is the district court's exclusion of a loss the court characterized as "double counting." We need not determine whether the district court was correct to exclude this loss because, even excluding this amount, the amount of damages that the evidence would support ($3,164,840) is more than the amount the jury awarded plaintiffs ($3,040,439). We therefore reverse the district court's grant of defendant's motion for a new trial because of plaintiffs' refusal to accept a remittitur to $388,146.20 and remand with instructions to reinstate the verdict awarding damages in the amount of $3,040,439 to plaintiffs by the jury in the first trial. See 4.0 *Acres of Land*, 175 F.3d at 1143 ("The jury award was not outside the range of evidence presented and a new trial should not have been granted.") (reinstating original jury verdict).

**B. Attorney's Fees**

42 U.S.C. § 3613(c)(2) provides that in an action brought under § 3613(a), a district court "in its discretion, may allow the prevailing party ...a reasonable attorney's fee and costs." After the second trial, the district court granted plaintiffs attorney's fees in the amount of $57,000. Analyzing plaintiffs' motion for attorney's fees under 42 U.S.C. § 1988, the court

concluded that because they established the city's liability, they were "prevailing parties" within the meaning of the act and so eligible for attorney's fees.[15] However, because plaintiffs only won nominal damages in the second trial, the court limited its award of attorney's fees to compensation "for a reasonable amount of time spent in obtaining a favorable verdict on the issue of liability." Plaintiffs appeal from the district court's award of attorney's fees, arguing that, should we reinstate the first jury's verdict, the fee award should be based on the first jury's damages award.

Because we reinstate the first jury's verdict, we vacate the district court's award of attorney's fees and remand with instructions that the district court should reconsider what constitutes "reasonable attorney's fees" in this litigation, in light of the first jury's award. 42 U.S.C. § 3613(c)(2). The

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[15] The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, provides that plaintiffs who successfully bring actions under certain civil rights acts are eligible for attorney's fees. Although the language of § 1988 and that of § 3613(c)(2) are almost identical, the court should have analyzed plaintiffs' motion for attorney's fees under § 3613(c)(2) because that is the statute providing for such awards in cases brought under § 3613(a) and because the Fair Housing Act is not among the civil rights statutes enumerated in § 1988. However, the district court properly could have relied upon cases interpreting § 1988 since "fee-shifting statutes' similar language is a strong indication that they are to be interpreted alike." *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n. 2, 105 L. Ed. 2d 639, 109 S. Ct. 2732 (1989) (internal quotation marks and citation omitted); *see also* 42 U.S.C. § 3602(o) ("'Prevailing party' has the same meaning as such term has in section 1988 of this title.").

district court should also consider the time and effort expended on the second trial and attendant motions.

## C. Remaining Issues

Because we reinstate the original jury verdict, it is unnecessary for us to consider any of plaintiffs' remaining claims, except one. After the end of the second trial, plaintiffs requested an injunction under § 3613(c)(1) enjoining the city from further violation of the Fair Housing Act or, in the alternative, an evidentiary hearing to determine the scope of necessary remedial measures.[16] The district court held that to obtain injunctive relief, plaintiffs "must show reasonable likelihood of future violations of the Fair Housing Acts." Finding that plaintiffs provided no evidence that the city was reasonably likely to violate the Fair Housing Act in the future, the district court denied plaintiff's motion.

### i. Standard of Review

We review a district court's decision concerning a permanent injunction for an abuse of discretion, but we review any determination that underlies the court's decision by the standard that applies to that decision. *Dare v.*

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[16] Section 3613(c)(1) states that if a district court "finds that a discriminatory housing practice has occurred or is about to occur, the court may ...grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate)."

*California*, 191 F.3d 1167, 1170 (9th Cir. 1999). Whether a plaintiff must show evidence that a defendant is reasonably likely to violate the Fair Housing Act in order to obtain an injunction under § 3613(c)(1) is a question of law. We review questions of law de novo. *Torres-Lopez v. May*, 111 F.3d 633, 638 (9th Cir. 1997).

**ii. Analysis**

Plaintiffs argue that in holding that the they must establish a reasonable likelihood that the city would continue to violate the Fair Housing Act, the district court reversed the burden of persuasion. They contend that since they have established that the city has violated the Fair Housing Act, future violation should be presumed. Plaintiffs' argument has merit. We have held that where a defendant has violated a civil rights statute, we will presume that the plaintiff has suffered irreparable injury from the fact of the defendant's violation. *Smallwood v. Nat'l Can Co.*, 583 F.2d 419, 420 (9th Cir. 1978) (discussing Title VII); *see also Burlington N.R.R. Co. v. Dep't of Revenue*, 934 F.2d 1064, 1074 (9th Cir. 1991) ("The standard requirements for equitable relief need not be satisfied when an injunction is sought to prevent the violation of a federal statute which specifically provides for injunctive relief." (internal quotation marks and citation omitted)); *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1423 (11th Cir. 1984) (stating that "irreparable injury may be presumed from the fact of discrimination and violations of fair housing statutes"). The jury returned a verdict in favor of plaintiffs, finding that the city had violated the Fair Housing Act. The city does not contest its liability. We therefore vacate the district court's order denying plaintiffs' motion for an injunction and remand for reconsideration.

## CONCLUSION

Because the district court abused its discretion and committed legal error in imposing a choice on plaintiffs to accept a remittitur or face a new trial on damages, we reverse the district court's order and remand with instructions to reinstate the first jury's verdict. Because the district court improperly shifted the burden to the plaintiffs to demonstrate irreparable injury, we vacate the district court's order denying plaintiffs' motion for an injunction and remand for reconsideration.

REVERSED AND REMANDED WITH INSTRUCTIONS.

## APPENDIX G

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

## CONSTITUTION OF THE UNITED STATES OF AMERICA

## ARTICLE I. LEGISLATIVE DEPARTMENT

**Sec. 10, Cl 1. Powers denied states--Treaties--Money--Ex post facto laws--Obligation of contracts.**

No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

## AMENDMENT 10

Powers reserved to states or people.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

## TITLE 11. BANKRUPTCY

## CHAPTER 1. GENERAL PROVISIONS

### § 109. Who may be a debtor

(a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title [11 USCS §§ 101 et seq.].

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(c) An entity may be a debtor under chapter 9 of this title [11 USCS §§ 901 et seq.] if and only if such entity -

(1) is a municipality;

(2) is specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter [11 USCS §§ 901 et seq.] by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter [11 USCS §§ 901 et seq.];

(3) is insolvent;

(4) desires to effect a plan to adjust such debts; and

(5) (A) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a

plan in a case under such chapter [11 USCS §§ 901 et seq.];

(B) has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter [11 USCS §§ 901 et seq.];

(C) is unable to negotiate with creditors because such negotiation is impracticable; or

(D) reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title [11 USCS § 547].

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## TITLE 11. BANKRUPTCY

## CHAPTER 9. ADJUSTMENT OF DEBTS OF A MUNICIPALITY

## SUBCHAPTER I. GENERAL PROVISIONS

### § 903. Reservation of State power to control municipalities

This chapter [11 USCS §§ 901 et seq.] does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of

the political or governmental powers of such municipality, including expenditures for such exercise, but–

(1) a State law prescribing a method of composition of indebtedness of such municipality may not bind any creditor that does not consent to such composition; and

(2) a judgment entered under such a law may not bind a creditor that does not consent to such composition.

**§ 904. Limitation on jurisdiction and powers of court**

Notwithstanding any power of the court, unless the debtor consents or the plan so provides, the court may not, by any stay, order, or decree, in the case or otherwise, interfere with

(1) any of the political or governmental powers of the debtor;

(2) any of the property or revenues of the debtor; or

(3) the debtor's use or enjoyment of any income-producing property.

**TITLE 11. BANKRUPTCY**

**CHAPTER 9. ADJUSTMENT OF DEBTS OF A MUNICIPALITY**

**SUBCHAPTER II. ADMINISTRATION**

**§ 921. Petition and proceedings relating to petition**

(a) Notwithstanding sections 109(d) and 301 of this title [11 USCS §§ 109(d) and 301], a case under this chapter [11 USCS §§ 901 et seq.] concerning an unincorporated tax or special assessment district that does not have such district's own officials is commenced by the filing under section 301 of this title [11 USCS § 301] of a petition under this chapter [11 USCS §§ 901 et seq.] by such district's governing authority or the board or body having authority to levy taxes or assessments to meet the obligations of such district.

(b) The chief judge of the court of appeals for the circuit embracing the district in which the case is commenced shall designate the bankruptcy judge to conduct the case.

(c) After any objection to the petition, the court, after notice and a hearing, may dismiss the petition if the debtor did not file the petition in good faith or if the petition does not meet the requirements of this title [11 USCS §§ 101 et seq.].

(d) If the petition is not dismissed under subsection (c) of this section, the court shall order relief under this chapter [11 USCS §§ 901 et seq.].

(e) The court may not, on account of an appeal from an order for relief, delay any proceeding under this chapter [11 USCS §§ 901 et seq.] in the case in which the appeal is being taken; nor shall any court order a stay of such proceeding pending such appeal. The reversal on appeal of a finding of jurisdiction does not affect the validity of any debt incurred that is authorized by the court under section 364(c) or 364(d) of this title [11 USCS § 364(c) or (d)].

## TITLE 11.
## BANKRUPTCY

## CHAPTER 9.
## ADJUSTMENT OF DEBTS OF A MUNICIPALITY

## SUBCHAPTER III.
## THE PLAN

### § 943. Confirmation

(a) A special tax payer may object to confirmation of a plan.

(b) The court shall confirm the plan if -

(1) the plan complies with the provisions of this title [11 USCS §§ 101 et seq.] made applicable by sections 103(e) and 901 of this title [11 USCS §§ 103(e) and 901];

(2) the plan complies with the provisions of this chapter [11 USCS §§ 901 et seq.];

(3) all amounts to be paid by the debtor or by any person for services or expenses in the case or incident to the plan have been fully disclosed and are reasonable;

(4) the debtor is not prohibited by law from taking any action necessary to carry out the plan;

(5) except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that on the effective date of the plan each holder of a claim of a kind specified in section 507(a)(1) of this title

will receive on account of such claim cash equal to the allowed amount of such claim;

(6) any regulatory or electoral approval necessary under applicable nonbankruptcy law in order to carry out any provision of the plan has been obtained, or such provision is expressly conditioned on such approval; and

(7) the plan is in the best interests of creditors and is feasible.

*Constitutional and Statutory Provisions Involved*

## PUBLIC LAW 94-260 [H.R. 10624]: April 8, 1976

## BANKRUPTCY ACT - DEBTS OF MUNICIPALITIES

*For Legislative History of Act, see p. 539*

An Act to amend chapter IX of the Bankruptcy Act to provide by voluntary reorganization procedures for the adjustment of the debts of municipalities.

Whereas the Congress finds and declares this Act and proceedings thereunder providing for the composition of indebtedness of, or authorized by, municipalities to be within the subject of bankruptcies under article I, section 8, clause 4 of the United States Constitution; and

Whereas the Congress finds that the impracticability of existing Federal bankruptcy remedies for use by municipalities increases the likelihood of their default and will aggravate the adverse effects thereof; and

Whereas the Congress finds that the financial disruptions and dislocations resulting from default of such municipalities without availability of a Federal procedure to restructure their indebtedness in such fashion as to avoid continuing insolvency would have a substantial adverse effect on interstate commerce within the meaning of article I, section 8, clause 3 of the United States Constitution, by reason of the commercial importance of the municipalities involved.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That

chapter IX of the Bankruptcy Act is amended to read as follows:

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"Sec. 85. (11 USC 405.) PETITION AND PROCEEDINGS RELATING TO PETITION. -

"(a) PETITION.- An entity eligible under section 84 may file a petition for relief under this chapter. In the case of an unincorporated tax or special assessment district having no officials of its own, the petition may be filed by its governing authority or the board or body having authority to levy taxes or assessments to meet the obligations of the district. Any party in interest may file an answer to the petition with the court, not later than 15 days after the publication of notice required by subsection (d) is completed, objecting to the filing of the petition. Upon the filing of such answer, the court may dismiss the petition after hearing on notice if the petitioner did not file the petition in good faith, or if the petition does not meet the requirements of this chapter. The court shall not, on account of an appeal from a finding of jurisdiction, delay any proceeding under this chapter in the case in which the appeal is being taken; nor shall any court order a stay of such proceeding pending such appeal. The reversal on appeal of a finding of jurisdiction shall not affect the validity of any certificate of indebtedness authorized by the court and issued in such case.

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*Constitutional and Statutory Provisions Involved*

DEERING'S CALIFORNIA CODES ANNOTATED

INCLUDING ALL URGENCY LEGISLATION
THROUGH 2003 REG. SESS.

CH. 671, 10/3/03 1ST EXTRA SESS.

CH. 13X, 8/2/03 AND

2ND EXTRA SESS. CH. 1XX, 2/20/03
GOVERNMENT CODE

TITLE 1. GENERAL

DIVISION 3.6.
Claims and Actions Against Public Entities and Public Employees

PART 5.
Payment of Claims and Judgments

CHAPTER 2.
Payment of Judgments Against Local Public Entities

**ARTICLE 1. General**

**§ 970.2. Duty of public entity to pay judgment in manner prescribed; Mandamus**

A local public entity shall pay any judgment in the manner provided in this article. A writ of mandate is an appropriate remedy to compel a local public entity to perform any act required by this article.

**§ 970.4. Payment from available funds; Unappropriated funds; Appropriated funds**

Except as provided in Section 970.6, the governing body of a local public entity shall pay, to the extent funds are available in the fiscal year in which it becomes final, any judgment, with interest thereon, out of any funds to the credit of the local public entity that are:

(a) Unappropriated for any other purpose unless the use of such funds is restricted by law or contract to other purposes; or

(b) Appropriated for the current fiscal year for the payment of judgments and not previously encumbered.

**§ 970.5. Deferring payment**

Except as provided in Section 970.6, if a local public entity does not pay a judgment, with interest thereon, during the fiscal year in which it becomes final, the governing body shall pay the judgment, with interest thereon, during the ensuing fiscal year immediately upon the obtaining of sufficient funds for that purpose.

**§ 970.6. Installment payments**

(a) The court which enters the judgment shall order that the governing body pay the judgment, with interest thereon, in not exceeding 10 equal annual installments if both of the following conditions are satisfied:

(1) The governing body of the local public entity has adopted an ordinance or resolution finding that an unreasonable hardship will result unless the judgment is paid in installments.

(2) The court, after hearing, has found that payment of the judgment in installments as ordered by the court is necessary to avoid an unreasonable hardship.

(b) Each installment payment shall be of an equal amount, consisting of a portion of the principal of the judgment and the unpaid interest on the judgment to the date of the payment. The local public entity, in its discretion, may prepay any one or more installments or any part of an installment.

**§ 970.8. Required funding**

(a) Each local public entity shall in each fiscal year include in its budget a provision to provide funds in an amount sufficient to pay all judgments in accordance with this article.

(b) If all or any portion of the revenue used for the maintenance and operation of a local public entity (other than an entity created by an agreement described in Section 895) liable for a judgment is derived from appropriations of another local public entity, such other local public entity shall in each fiscal year appropriate funds equal to its pro rata share of an amount sufficient to permit the local public entity liable for the judgment to pay the judgment in accordance with this article. Such amount shall be paid to the local public entity liable for the judgment and shall be used by such entity to satisfy the judgment. The pro rata share of such other local public entity for each judgment is an amount bearing the same

proportion to the total amount of the judgment as the revenue derived from such other local public entity for maintenance and operation during the fiscal year in which the cause of action on such judgment accrued bears to the total revenues used for maintenance and operation during such fiscal year of the local public entity liable for the judgment. For this purpose, such other local public entity shall include in its budget a provision to provide funds sufficient in amount to make the appropriation and payment required by this section.

**§ 971.Definitions; Application of tax limitations**

(a) As used in this section:

(1) "Judgment resulting from a discretionary act" means a judgment arising from a liability which the local public entity has discretion to incur or not to incur and includes a judgment rendered in an eminent domain proceeding and a judgment requiring specific performance of a contractual obligation or awarding damages for failure to perform a contractual obligation.

(2) "Judgment resulting from a nondiscretionary act" means a judgment other than one described in paragraph (1) and includes a judgment founded upon tort or inverse condemnation liability.

(b) Any limitation on the amount of taxes, assessments or rates and charges that may be levied or collected by a local public entity, and any limitation on the amount of appropriations and payments that may be made by a local public entity, and any limitation on the amount of liability or

indebtedness that may be incurred by a local public entity, contained in any other statute or in any charter or ordinance:

(1) Applies to the taxes, assessments, rates and charges or appropriations levied, collected or made to pay pursuant to this article a judgment resulting from a discretionary act.

(2) Does not apply to the taxes, assessments, rates and charges or appropriations levied, collected or made to pay pursuant to this article a judgment resulting from a nondiscretionary act.

(c) For the purposes of Section 2271 of the Revenue and Taxation Code, taxes levied to pay pursuant to this article a judgment resulting from a nondiscretionary act are levied to pay costs mandated by the courts.

**§ 971.2. Judgments as legal investments or security**

(a) All judgments for which a local public entity is liable are legal investments for all trust funds, and for the funds of all insurance companies, banks (both commercial and savings) and trust companies, and for every other local public entity within this state, to the same extent as bonds of the local public entity liable for the judgment.

(b) Whenever any money or funds may by law be invested in or loaned upon the security of bonds of a local public entity, such money or funds may be invested in or loaned upon the security of a judgment for which such local public entity is liable; and whenever bonds of a local public entity may be

used as security for the faithful performance or execution of any court or private trust or of any other act, a judgment for which such local public entity is liable may be so used.

(c) All judgments for which a local public entity is liable, to the same extent as bonds of such local public entity, are legal for use by any state or national bank or banks in the state as security for the deposit of funds of any local public entity within this state.

## ARTICLE 2. Funding Judgments With Bonds

### § 975. "Board"; "Local taxing entity"

As used in this article:

(a) "Board" means the governing body of a local taxing entity.

(b) "Local taxing entity" means a local public entity that has the power to levy ad valorem taxes, or ad valorem assessments, upon property within the territory of the entity.

### § 975.2. Resolution for incurrence of bonded indebtedness

Whenever the board deems it necessary for the local taxing entity to incur a bonded indebtedness to fund all or any portion of an outstanding judgment against the entity, it shall by resolution state:

(a) The necessity for the indebtedness.

(b) The purpose for which the proposed debt is to be incurred.

(c) The amount of the proposed debt.

(d) The time and place for a hearing by the board on the question whether the local taxing entity should incur a bonded indebtedness to fund all or any portion of an outstanding judgment against the entity.

**§ 975.4. Publication or posting of notice of hearing**

Notice of the hearing shall be given by publication of a copy of the resolution pursuant to Section 6066 in a newspaper of general circulation circulated within the local taxing entity. If there is no such newspaper, the resolution shall be posted in three public places in the local taxing entity for two succeeding weeks. No other notice of the hearing need be given.

**§ 975.6. Notice accompanying copy of resolution**

The copy of the resolution published or posted shall be accompanied by a notice subscribed by the clerk or secretary of the local taxing entity that:

(a) The hearing referred to in the resolution will be had at the time and place specified in the resolution.

(b) At that time and place, any person interested, including persons owning property within the local taxing entity, will be heard upon the question stated in the resolution.

**§ 975.8. Conduct of hearing; Determination by board**

At the time and place fixed for the hearing on the resolution or at any time and place to which the hearing is adjourned, the board shall proceed with the hearing. Any person interested, including persons owning property within the local taxing entity, may appear and present any matters material to the question set forth in the resolution. Thereafter, the board shall determine whether it is necessary to incur the bonded indebtedness. The board's determination on the question of necessity is conclusive.

**§ 976. Resolution for bond election**

After the board has made its determination pursuant to Section 975.8, if it deems it necessary to incur the bonded indebtedness, it shall by resolution state:

(a) That it deems it necessary to incur the bonded indebtedness.

(b) The purpose for which the bonded indebtedness will be incurred.

(c) The amount of the debt to be incurred, which amount may include legal and other fees and costs incidental to or connected with the authorization, issuance and sale of the bonds, including but not limited to the costs of printing the bonds.

(d) The maximum term the bonds to be issued shall run before maturity, which term shall not exceed 40 years.

(e) The annual rate of interest to be paid, which rate shall not exceed 7 percent, payable annually or semiannually, or in part annually and in part semiannually.

(f) The proposition to be submitted to the voters.

(g) The date of the special election of the local taxing entity (which may be consolidated with any other election of the local taxing entity) at which such proposition shall be submitted to the voters; the manner of holding the election and the procedure for voting for or against the proposition.

**§ 976.2. Resolution as notice of election; Publication or posting**

The resolution made pursuant to Section 976 shall constitute the notice of such election and such resolution shall be published pursuant to Section 6066 in a newspaper of general circulation circulated within the local taxing entity. If there is no such newspaper, the resolution shall be posted in three public places in the local taxing entity for two succeeding weeks. No other notice of the election need be given.

**§ 976.4. Application of provisions governing general elections**

The board shall provide for holding the election in the same manner as provided by law in respect to general elections of the local taxing entity so far as applicable, except as otherwise provided in this article.

**§ 976.6. Qualified voters**

Every elector authorized to vote in general elections of the local taxing entity may vote on the proposition to authorize the bonds.

**§ 976.8. Vote authorizing board to issue bonds**

If two-thirds or more of the votes cast upon the proposition at the election are in favor of incurring the bonded indebtedness, the board may issue the bonds at the time or times it deems proper.

**§ 977. Form of bonds; Denominations; Time and place for payment**

The board shall prescribe the form of the bonds. The bonds may be issued in denominations not to exceed one thousand dollars ($1,000) and not less than one hundred dollars ($100). The board shall fix, and designate in the bonds, a time and place for payment of the bonds.

**§ 977.2. Redemption of bonds**

The board may provide for the redemption of bonds issued under this article before maturity at prices determined by it. A bond shall not be subject to call or redemption prior to maturity unless it contains a recital to that effect. Notice of redemption shall be published at such time and in such manner as the board may provide in the resolution providing for the issuance of the bonds.

**§ 977.4. Signing of bonds**

The bonds shall be signed by the presiding officer of the board and countersigned by the clerk or secretary of the local taxing entity, and the coupons shall be signed by the clerk or secretary. All signatures except that of the clerk or secretary on the bonds may be printed, lithographed or engraved. If any officer whose signature appears on the bonds or coupons ceases to be such officer before the delivery of the bonds, his signature is as effective as if he had remained in office.

**§ 977.6. Sale of bonds**

The local taxing entity may sell the bonds at the times or in the manner the board deems to be to the public interest. The bonds shall be sold on sealed proposals to the highest bidder after advertising for bids by publication of notice of sale pursuant to Section 6061, not less than 10 days prior to the date of sale, in a newspaper of general circulation circulating in the local taxing entity. If there is no such newspaper, the notice of sale shall be posted in three places in the local public entity for two succeeding weeks ending not less than 10 days prior to the date of sale. If satisfactory bids are received, the bonds offered for sale shall be awarded to the highest responsible bidder. If no bids are received or if the board determines that the bids received are not satisfactory as to price or responsibility of the bidders, the board may reject all bids received, if any, and either readvertise or sell the bonds at private sale.

**§ 977.8. Action to determine validity of bonds**

An action to determine the validity of bonds may be brought pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure.

**§ 978. Exemption of bonds from taxation; Bonds as legal investments**

Any bonds issued by any local taxing entity under the provisions of this article have the same force, value and use as bonds issued by any municipality and are exempt from all taxation within the State.

Such bonds are legal investments for all trust funds, for the funds of all insurance companies, banks (both commercial and savings) and trust companies, for the state school funds, and for any funds which may be invested in bonds of cities, counties, school districts, or municipalities in the State.

**§ 978.2. Payment of bonds and interest; Property in local entity as subject to taxation; Levy of tax or assessment**

Bonds issued under this article constitute general obligations of the local taxing entity for the payment of both principal and interest of which all property in the local taxing entity subject to ad valorem taxation by the local taxing entity or subject to ad valorem assessment by the local taxing entity shall be taxed or assessed without limitation of rate or amount.

The board shall, at the time and in the manner provided by law for levying taxes or assessments, fix an ad valorem

rate of tax or assessment sufficient to pay the principal of and interest on all bonds issued under this article as they become due. Such ad valorem taxes or assessments shall be in addition to all other taxes or assessments levied by the local taxing entity, and when collected shall be used for no purpose other than the payment of such bonds and the interest thereon.

Nothing in this section shall be construed to prohibit the use of other revenues of the local taxing entity for the payment of principal and interest on bonds issued under this article.

**§ 978.4. Use of proceeds from sale of bonds**

The proceeds from the sale of bonds issued pursuant to this article shall not be used for any purpose other than the purpose stated in the resolution authorizing the issuance of the bonds.

**§ 978.6. Resolution voiding unsold bonds**

The board may be resolution adopted by two-thirds vote of all its members declare that no part of a described bond issue authorized under this article which remains unsold shall be issued or sold. When the resolution takes effect, the bonds described in the resolution which remain unsold are voided.

**§ 978.8. Authority provided in article as supplementary**

The authority provided in this article is in addition and supplementary to any other law authorizing public entities to issue bonds to fund an outstanding indebtedness.

*Constitutional and Statutory Provisions Involved*

DEERING'S CALIFORNIA CODES ANNOTATED

INCLUDING ALL URGENCY LEGISLATION
THROUGH 2003 REG. SESS.

CH. 909, 10/12/03

1ST EXTRA SESS. CH. 13X, 8/2/03 AND

2ND EXTRA SESS. CH. 1XX, 2/20/03

GOVERNMENT CODE

TITLE 3. Government of Counties

DIVISION 2.
Officers

PART 2.
Board of Supervisors

CHAPTER 5.
County Property

**ARTICLE 1. General**

**§ 25350.55. Repayment of revenue bonds**

(a) Prior to entering into an agreement to finance the lease or lease-purchase of property through the execution and delivery or issuance, as the case may be, of certificates of participation or lease revenue bonds, the board may elect, by resolution, to

guarantee payment under that financing agreement in accordance with the following:

(1) A county that elects to participate under this section shall provide notice to the Controller of that election, which shall include a schedule for the payments to be made by the county under that financing agreement, and identify a trustee appointed by the county for the purposes of this section.

(2) In the event that, for any reason, the funds otherwise available to the county will not be sufficient to make any payment under the financing agreement at the time that payment is required, the county shall so notify the trustee. The trustee shall immediately communicate that information to the affected holders of certificates of participation or bondholders, and to the Controller.

(3) When the Controller receives notice from the trustee as described in paragraph (2), or the county fails to make any payment under the financing agreement at the time that payment is required, the Controller shall make an apportionment to the trustee in the amount of that required payment for the purpose of making that payment. The Controller shall make that payment only from moneys credited to the Motor Vehicle License Fee Account in the Transportation Tax Fund to which that county is entitled at that time under Chapter 5 (commencing with Section 11001) of Part 5 of Division 2 of the Revenue and Taxation Code, and shall thereupon reduce, by the amount of the payment, the subsequent allocation or allocations to which the county would otherwise be entitled under that chapter.

(4) As an alternate to the procedure set forth in paragraphs (2) and (3), the board of supervisors may provide a transfer schedule in a notice to the Controller of its election to participate under this section. The transfer schedule shall set forth amounts to be transferred to the trustee and the date or dates for the transfers and the Controller shall, subject to the limitation in the second sentence of paragraph (3), make apportionments to the trustee in those amounts on the specified date or dates for the purpose of making those transfers.

(5) In the event that for any reason, the county is no longer obligated for any period to make all or a portion of the payments with respect to the lease or lease-purchase financed through the execution and delivery, or issuance, as the case may be, of certificates of participation or lease revenue bonds, the trustee shall notify the affected holders of certificates of participation or bondholders. The trustee shall also notify the Controller. Upon receipt of the notification, the Controller shall cease making the transfers. If after giving notice, the obligation of the county to make payments with respect to a lease or lease-purchase financed through the execution and delivery or issuance, as the case may be, of certificates of participation or lease revenue bonds is restored, the trustee shall so notify the affected holders of certificates of participation or bondholders and the Controller. Upon receipt of the notification, the Controller shall resume making the transfers.

(b) This section shall not be construed to obligate the State of California to make any payment to a county from the Motor Vehicle License Fee Account in the Transportation Tax Fund in any amount or pursuant to any particular allocation

formula, or to make any other payment to a county, including, but not limited to, any payment in satisfaction of any debt or liability incurred or guaranteed by a county in accordance with this section.

**NOTES:**

SEC. 2. The Legislature hereby finds and declares all of the following:

(a) The County of Orange government lacks sufficient resources to finance an acceptable plan of adjustment in its pending bankruptcy case.

(b) On June 27, 1995, the voters of the county defeated a proposed sales tax increase, indicating the public's unwillingness to raise new revenue to finance a plan of adjustment.

(c) It is in the interest of the state and all public debt issuers within the state to enable the county to finance an acceptable plan of adjustment in order to improve the credit standing of California public debt issuers and to preserve and protect the health, safety, and welfare of the residents of the county and the state. To that end, successfully resolving the county bankruptcy and restoring the financial position of Orange County government and thereby permitting the full performance under the county's indebtedness is a matter of statewide interest and concern.

(d) In the absence of some alternative source of revenue not now available to the county, resources from other governmental units within the county must be transferred to

the county to enable it to prepare, and obtain confirmation of, an acceptable plan of adjustment.

(e) The transfer of resources to the county should be designed to minimize the impact on affected entities.

(f) The emergence from bankruptcy of the county through the confirmation of an adequate plan of adjustment will assist in the effectuation of the primary purposes of the Community Redevelopment Law (Part 1 (commencing with Section 33000) of Division 24 of the Health and Safety Code), including job creation, attracting new private commercial investments, the physical and social improvement of residential neighborhoods, and the provision and maintenance of low- and moderate-income housing. The attraction of new businesses to redevelopment project areas depends on the existence of an effective county government that is not burdened by litigation and other requirements of a bankruptcy proceeding. The payments to the county pursuant to Section 33670.9 of the Heath and Safety Code benefit redevelopment project areas and are deemed a debt of the Orange County Development Agency to repay the county for such general and specific benefits to the redevelopment project areas previously provided by the county.

DEERING'S CALIFORNIA CODES ANNOTATED

INCLUDING ALL URGENCY LEGISLATION
THROUGH 2003 REG. SESS.

CH. 909, 10/12/03

1ST EXTRA SESS. CH. 13X, 8/2/03 AND

2ND EXTRA SESS. CH. 1XX, 2/20/03
GOVERNMENT CODE

TITLE 4. Government of Cities

DIVISION 1.
Cities Generally

CHAPTER 2.
Classification

**§ 34102. "General law cities"**

Cities organized under the general law shall be "general law cities."

## APPENDIX H

## BANKRUPTCY ACT - DEBTS OF MUNICIPALITIES

P.L. 94-260,

House Report (Judiciary Committee) No. 94-686,
Dec. 1, 1975 (To accompany H.R. 10624)

Senate Report (Judiciary Committee) No. 94-458,
Nov. 18, 1975 (To accompany S. 2597)

House Conference Report No. 94-938, Mar. 22, 1976
(To accompany H.R. 10624)
Cong. Record Vol. 121 (1975)
Cong. Record Vol. 122 (1976)

DATES OF CONSIDERATION AND PASSAGE
House December 9, 1975; March 25, 1976
Senate December 10, 1975; March 25, 1976
The House bill was passed in lieu of the Senate bill. The House Report and the House Conference Report are set out.

HOUSE CONFERENCE REPORT NO. 94-938
Mar. 22, 1976

JOINT EXPLANATORY STATEMENT OF THE
COMMITTEE OF CONFERENCE

The managers of the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 10624) to

revise chapter IX of the Bankruptcy Act, report that the conferees have been unable to agree.

The House bill and the Senate amendments make access to the court of bankruptcy by a municipality that is unable to pay its debts as they mature virtually limitless. The managers have concluded that access to the court of bankruptcy should be limited, by requiring a distressed municipality to meet one of four conditions before it may petition a court of bankruptcy for relief. This requirement is discussed in the analysis of section 84, infra. However, addition of this provision is beyond the authority of the managers on the part of the House and the Senate, because it is not within the scope of the matters committed to conference.

On all other matters, the managers on the part of the House and the Senate have agreed. The substance of the agreement is contained in a draft of House amendments to the Senate amendments, set forth in full below. The managers on the part of the House will offer a motion to agree to the amendments of the Senate with these amendments. The motion will be: That the House agrees to the amendments of the Senate to the bill (H.R. 10624) entitled "An Act to revise chapter IX of the Bankruptcy Act," with the following

## DESCRIPTION OF THE PROPOSED AMENDMENT TO THE SENATE AMENDMENTS

The first proposed amendment amends the text of the bill. The second proposed amendment accepts the third Senate amendment, which amended the title of the bill, with an amendment to conform it to the amendment proposed by the first House amendment. There is no amendment to the second

Senate amendment, which inserted a preamble after the title of the bill, because the Managers on the part of the House propose to recede from the House's disagreement with the Senate on the preamble.

## DISCUSSION OF FIRST PROPOSED HOUSE AMENDMENT TO THE SENATE AMENDMENTS

The first Senate amendment struck out all after the enacting clause of the bill, H.R. 10624, and inserted in lieu thereof the text of a Senate bill, S. 2597, as amended. This first proposed amendment adopts this Senate amendment with an amendment. The amendment is the proposed text of a compromise bill, set out above. What follows is a section-by-section analysis of the proposed text.

***

## SECTION 85

The House bill gave the governing body of an entity with no officials of its own the power to file a petition under this chapter. H.R. Sec. 85(a); H. Rep. 20. The Senate amendment made no comparable provision. The proposed text adopts the House provision.

The House bill allowed 15 days from the completion of the publication of notice for filing a complaint objecting to the petition. H.R. Sec. 85(a); H. Rep. 20-21. The Senate amendment allowed 30 days from the filing of the petition. S. Sec. 806(a); S. Rep. 18. The proposed text adopts the House provision.

The House bill required the court to hear any objections to the petition in a single proceeding to the extent practicable. H.R. Sec. 85(a); H. Rep. 21. The Senate amendment contained no similar requirement. The proposed text adopts the Senate version.

The Senate amendment allowed dismissal of the petition if it did not meet the provisions of the chapter, or if the petitioner did not file the petition in good faith. S. Sec. 806(1); S. Rep. 18. The House bill had no comparable provision. H.R. Sec. 84; H. Rep. 20. The proposed text adopts the Senate language.

The Senate amendment prohibited interlocutory appeals from a finding of jurisdiction, in order to prevent delay in the proceedings and increase the marketability of certificates of indebtedness. The House bill had no comparable provision. S. Sec. 806(c); S. Rep. 18. The proposed text includes compromise language designed to achieve the same result. It prohibits any delay of the proceedings because of an appeal from a finding of jurisdiction, and any stay pending such an appeal. It also specifies, in an attempt to codify the result currently achieved in chapter X, that the reversal on appeal of a finding of jurisdiction shall not, in and of itself, affect the validity of any certificate of indebtedness.

Subsection (b) describes the requirements of the list of creditors. The House bill required a list of all of the petitioner's creditors. H.R. Sec. 85(b); H. Rep. 21. The Senate amendment required a list of only those creditors who would be affected by the plan; S. Sec. 804(a); S. Rep. 17; and added the requirement that the list of creditors contain the name, address, and character of the claim of each creditor; S.

Sec. 809(a). The proposed text adopts the House position plus the Senate addition, but eliminates the requirement in the House bill that the petitioner state in the petition the reason an identification of a creditor is impracticable.

The Senate amendment also required that the list of creditors contain the character of the claims of unidentified creditors; S. Sec. 809(a); and required that the list of creditors be supplemented as the petitioner became able to identify previously unidentified creditors. S. Sec. 809(a). S. Rep. 19. The House bill contained no similar requirement. H. Rep. 21. The proposed text adopts the Senate language, in order to accommodate the identification of holders of bearer bonds.

The House bill made the list and notice requirements mandatory, H.R. Sec. 81(8), (9), 85(b), (d), 90(b); H. Rep. 21, 22, 29. The Senate amendment permitted the court to modify these requirements. S. Sec. 809(c); S. Rep. 19. The proposed text adopts the House version.

The House bill required the court to give all notices. H.R. Sec. 85(d); H. Rep. 22. The Senate amendment required the petitioner, or such other person as the court designated, to give notice. S. Sec. 807(a); S. Rep. 18. The proposed text adopts the Senate language.

The Senate amendment required mailing of notice to creditors who were identified after the initial mailing of notice. S. Sec. 807(a). The House bill had no comparable provision. The proposed text adopts the Senate version.

Subsection (e) grants an automatic stay of actions seeking to enforce claims. The House bill stayed "a proceeding against the petitioner, its property or any officer or inhabitant of the petitioner, which seeks to enforce any claim against the petitioner." H.R. Sec. 85(e)(1); H. Rep. 22-23. The Senate amendment stayed a "proceeding against the petitioner, its property or any officer or inhabitant of the petitioner, or which seeks to enforce any claim against the petitioner"; S. Sec. 805(a); S. Rep. 17; or which seeks to enforce a lien on taxes or assessments; id. The proposed text adopts the House provision for the first portion, but adds and amplifies the second portion on taxes.

The House bill and the Senate amendment required a hearing on a complaint seeking relief from the automatic stay. H.R. Sec. 85(e)(3); H. Rep. 23. S. Sec. 805(d). Only the Senate amendment required the hearing at the earliest possible date. S. Sec. 805(d). The proposed text adopts the Senate provision.

Subsection (e) also specifies conditions to additional stays. The House bill prohibited the court from requiring the petitioner to post security as a condition to an additional stay. H.R. Sec. 85(e)(4); H. Rep. 23. The Senate amendment made security discretionary with the court. S. Sec. 805(e); S. Rep. 17. The proposed text adopts the Senate version.

Subsection (g) allows recovery of set-offs effected before the filing of the petition. The House bill made set-offs within four months of the petition recoverable. H.R. Sec. 85(g); H. Rep. 2. The Senate amendment set the time at three months. S. Sec. 805(b)(2); S. Rep. 17. The proposed text adopts the House provision.

This subsection also specifies the protection the court may require the petitioner to furnish as a condition to recovery of a set-off. The House bill allowed "protection for the realization by the person against whom recovery is sought of the claim which arises by reason of the recovery". H.R. Sec. 85(g); H. Rep. 3. The Senate amendment allowed "such protection as will adequately protect the person who is asserting the right of set-off". S. Sec. 805(b)(2). The proposed text adopts the House version.

Subsection (h) makes some of the avoiding powers of the Bankruptcy Act available in Chapter IX. The Senate amendment made applicable sections 60a, 60b, 60c, 67, 70c, and 70e. S. Sec. 801(e); S. Rep. 16. The House bill contained no comparable provision. The proposed text makes only sections 60a, 60c, 67a, 67d, 70c, 70e(1), and 70e(2), and the first three sentences of section 60b apply. The exclusion of only the last sentence of section 60b and of section 70(e)(3) is meant to confer exclusive jurisdiction of actions under the applicable sections on the federal district courts, and to withdraw concurrent jurisdiction from the State courts. These sections apply as though the petitioner were the trustee, debtor or bankrupt, thus transferring the avoiding powers to the petitioner itself, without the need for the appointment of an independent trustee. However, if the petitioner refuses to pursue a cause of action based on those sections, this section permits the court, on the application of a creditor, to appoint a trustee to pursue the cause of action. The trustee is given no other powers. The definition of person in section 81(7) is not intended to enlarge the scope of the avoiding powers when applied in Chapter IX. The definition of person found in section 1(23) of the Bankruptcy Act

continues to be the proper definition in the construction of those sections when applied in this chapter.

***

DON EDWARDS,
JOHN SEIBERLING,
ROBERT F. DRINAN,
HERMAN BADILLO,
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*Managers on the Part of the Senate.*

## APPENDIX I

**PENNBANK, Petitioner**

**v.**

**THE HONORABLE WILLIAM B. WASHABAUGH, JR.,**

**and**

**NORTH AND SOUTH SHENANGO JOINT MUNICIPAL AUTHORITY, et al.,**

**No. 81-2678**

**(3rd Circuit, C.C.A., December 2, 1981, Before: Hunter, Rosenn, and Weis, Circuit Judges)**

Following the bankruptcy court ruling, a secured creditor petitioned the appellate court to issue writs of mandamus and prohibition on the ground that the bankruptcy court had exceeded its powers by assuming jurisdiction over a municipal authority which had filed a petition under chapter 9 of the Code.

The Court of Appeals denied the request for mandamus and prohibition and held that because a rational argument could be made in support of the bankruptcy court's exercise of jurisdiction, the questioned jurisdictional ruling did not satisfy the requirements for the issuance of peremptory writs.

[1] 11 U.S.C. § 904. Chapter 9; Jurisdiction

When a petitioner requests that an appellate court issue peremptory writs of mandamus and prohibition against a bankruptcy court ruling on the ground that the bankruptcy court had exceeded its jurisdiction by permitting an independent municipal authority to file for relief under chapter 9 without first obtaining state approval, the request for the writs should be denied if a rational and substantial legal argument can be made in support of the questioned jurisdictional ruling and if the bankruptcy court followed any clear dictate of law in exercising its powers. (Collier on Bankruptcy, 15th ed., 4:904.02)

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Bernhard Schaffler, Esq., Pittsburgh, Pennsylvania; Robert O. Lampl, Esq., Campbell, Lampl & Levine, Pittsburgh, Pennsylvania, and Edward G. Shoemaker, Esq. & John V. Adams, Jr., Esq., Adams, Shoemaker, & McSorely, Esqs., Pittsburgh, Pennsylvania, for Respondent North and South Shenango Joint Municipal Authority.

Michael A. Donadee, Esq., Chief Counsel, Department of Community Affairs, Harrisburg, Pennsylvania, and Douglas R. Blazey, Esq., Chief Counsel, Department of

Environmental Resources, Harrisburg, Pennsylvania, for Respondent Commonwealth of Pennsylvania.

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*Per Curiam*: The North and South Shenango Joint municipal Authority was incorporated under the Pennsylvania Municipality Authorities Act, PA. STAT. ANN. Tit. 53, §§ 301-322 (Purdon), to construct and operate a sewer system. Funding was to be provided by federal and state grants, with interim financing in the form of a $6 million loan supplied by PennBank.

Believing that the security of its loan was in jeopardy, PennBank brought a receivership action against the authority in the court of common pleas pursuant to § 308 of the Municipality Authorities Act. The Authority countered by filing a petition for an adjustment of its debts under Chapter 9 of the Bankruptcy Act, 11 U.S.C. §§ 901-946.

The Bankruptcy Court for the Western District of Pennsylvania denied a motion by PennBank to dismiss the Authority's petition for lack of jurisdiction. The Court held that the Authority qualified as a Chapter 9 debtor because it was a "municipality" within the meaning of 11 U.S.C. § 109(c)(1). In addition, the court concluded that Pennsylvania law "generally authorized" the Authority to seek Chapter 9 relief as required by 11 U.S.C. § 109 (c)(2).

The Pennsylvania Departments of Community Affairs and Environmental Resources joined the motion to dismiss the bankruptcy proceeding on the grounds that , *inter alia*, the Authority had not received permission from the state to file its bankruptcy petition, as demanded of political subdivisions by

PA. Stat. Ann. tit. 53, §§ 5571-5572 (Purdon). The bankruptcy court concluded that the Authority was not required to obtain permission form the state because Pennsylvania law excluded it from the definition of "political subdivision." *See Commonwealth v. Erie Metropolitan Transit Authority*, 444 Pa. 345, 281 A.2d 882 (1971). Accordingly, the State's motion was also denied.

PennBank then filed a petition in this court for Writs of Mandamus and Prohibition, asserting that the bankruptcy court exceeded its powers by assuming jurisdiction over the Authority. PennBank also filed an appeal in the district court raising the same issues. In their responses to the petition, the Commonwealth of Pennsylvania agreed with PennBank's position, whereas the Authority defends the bankruptcy court's assumption of jurisdiction.

[1]PennBank acknowledged at oral argument that a party petitioning for a peremptory writ must establish a clear and indisputable right. As we said in *American Airlines v. Forman*, 204 F.2d 230, 232 (3d Cir. 1953), "the challenged assumption or denial of jurisdiction must be so plainly wrong as to indicate failure to comprehend or refusal to be guided by unambiguous provisions of a statute or settled common law doctrine. If a rational and substantial legal argument can be made in support of the questioned jurisdictional ruling, the case is not appropriate for mandamus or prohibition even though on normal appeal a reviewing court might find reversible error."

Applying that standard to the case at hand leads us to deny the petition. Just as in *American Airlines v. Forman*, 204 F.2d at 232, the bankruptcy court here "has neither ignored

nor refused to follow any clear dictate of the law." We conclude therefore that petitioner is unable to meet the high threshold required for issuance of the peremptory writs.

The issue of jurisdiction may be raised through the prescribed process of appeal and our decision today in no way implies any view on the merits of that dispute. We do not decide here whether the bankruptcy court was right or wrong in assuming jurisdiction. We decide only that a peremptory writ will not issue.

Accordingly, the petition for mandamus or prohibition will be *denied*.

Supreme Court, U.S.
FILED
DEC 12 2003
OFFICE OF THE CLERK

No. 03-702

In The
# Supreme Court of the United States

SILVER SAGE PARTNERS, LTD.; RICHARD EARLIX; ROBERT E. FILLET; PAUL SABEN; MICHAEL LINSK; EDWARD MOORE, JR.; AND ALBERT PIMENTEL,

*Petitioners,*

v.

CITY OF DESERT HOT SPRINGS,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION

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TABLE OF CONTENTS


| | Page |
|---|---|
| REASONS FOR DENYING THE WRIT | 1 |
| I. The Ninth Circuit's Decision Is Consistent With The Bankruptcy Code And The Settled Law Of Federal Appellate Jurisdiction | 3 |
| A. Section 921(e) Does Not Authorize Interlocutory Review | 5 |
| B. The Bankruptcy Court's Order Is Not An Appealable "Collateral Order" | 7 |
| II. The Ninth Circuit's Decision Does Not Conflict With The Holding Of Any Court At Any Level | 11 |
| III. The Ninth Circuit's Decision Does Not Raise Any Issue Of Constitutional Law | 12 |
| CONCLUSION | 14 |

# TABLE OF AUTHORITIES

Page

CASES

*In re Cash Currency Exchange, Inc.*, 762 F.2d 542 (7th Cir. 1985) ..... 3, 9

*In re Committee of Asbestos-Related Litigants*, 749 F.2d 3 (2d Cir. 1984) ..... 3

*Cunningham v. Hamilton County, Ohio*, 527 U.S. 198 (1999) ..... 3

*Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994) ..... 7, 8, 10

*Dunkley v. Rega Properties, Ltd. (In re Rega Properties, Ltd.)*, 894 F.2d 1136 (9th Cir. 1990) ..... 3

*Farber v. 405 N. Bedford Dr. Corp. (In re 405 N. Bedford Dr. Corp.)*, 778 F.2d 1374 (9th Cir. 1985) ..... 3

*Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988) ..... 10

*Guyther v. Hebb (In re Hebb)*, 53 B.R. 1003 (D. Md. 1985) ..... 3, 8

*Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495 (1989) ..... 10

*Path-Science Laboratories, Inc. v. Greene County Hospital (In re Greene County Hospital)*, 835 F.2d 589 (5th Cir. 1988) ..... 9, 11

*Pennbank v. Washabaugh (In re North and South Shenango Joint Municipal Authority)*, 673 F.2d 1301 (3d Cir. 1981) ..... 11

*In re Pleasant View Utility Dist.*, 27 B.R. 552 (M.D. Tenn. 1982) ..... 11

*Promenade Nat'l Bank v. Phillips (In re Phillips)*, 844 F.2d 230 (5th Cir. 1988) ..... 3

TABLE OF AUTHORITIES – Continued

Page

*United States v. Bekins*, 304 U.S. 27 (1938) ..... 2, 13

*Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988) ..... 10

*Warner v. Unsecured Creditors' Committee (In re Warner)*, 94 B.R. 734 (M.D. Fla. 1988) ..... 3, 8

*Whaley v. United States*, 76 B.R. 95 (N.D. Miss. 1987) ..... 3

STATUTES AND RULES

11 U.S.C. § 109 ..... 12
§ 361 ..... 10
§ 362 ..... 10
§ 903 ..... 12
§ 904 ..... 12
§ 921 ..... *passim*
§ 930 ..... 10
§ 943 ..... 8

28 U.S.C. § 157 ..... 10
§ 158 ..... 1, 3, 6
§ 1292 ..... 6

Cal. Gov't Code § 43739 ..... 13
§ 53760 ..... 13

Fed. R. Bankr. P. 8005 ..... 5

## REASONS FOR DENYING THE WRIT

The only question presented by the Petition is whether the Bankruptcy Court's order denying the Petitioners' objection to and motion to dismiss the Respondent's chapter 9 bankruptcy case is subject to immediate review on appeal. The Ninth Circuit answered this question in the negative, holding that the order was not final and not immediately appealable. Pet. at 1a-19a.

As they must, the Petitioners agree that the Bankruptcy Court's order was interlocutory. Pet. at 3, 11. The order did not determine any substantive rights or otherwise cause any irreparable harm to the Petitioners, who simply hold an unsecured claim against the Respondent. Rather, as the Ninth Circuit noted, the order "merely allows the municipality to proceed with the bankruptcy." Pet. at 2a, 15a. Under basic rules of federal appellate jurisdiction, the Petitioners therefore had no right to an immediate appeal of the order. *See* 28 U.S.C. § 158(a)(3) (review of an interlocutory order of the bankruptcy court is available only "with leave of the court").

Despite this, the Petitioners argue that the Ninth Circuit erred, and that a writ should be granted, because "Congress contemplated an interlocutory appeal as of right for such orders." Pet. at 3. This argument is premised upon a misinterpretation of section 921(e) of the Bankruptcy Code, which *prohibits* the issuance of a stay when *discretionary* interlocutory review is granted. Nothing in section 921(e) or any other part of the Bankruptcy Code *authorizes* an interlocutory appeal or otherwise overrides title 28's requirements for appellate jurisdiction.

More fundamentally, this is not an important question of federal law that would justify review in this Court. The

Petitioners thought so little of their current argument that they did not even cite section 921(e) or the legislative history on which they now rely either to the Bankruptcy Appellate Panel or to the Ninth Circuit's merits panel, raising the issue for the first time only in their petition for rehearing to the Ninth Circuit.

There also is no conflict among the circuits. Both the Fifth Circuit and the Ninth Circuit now have squarely held that an order denying an objection to a chapter 9 municipal bankruptcy case is interlocutory and not immediately reviewable. The unpublished opinion of the Third Circuit cited by the Petitioners (also for the first time in their petition for rehearing) does not conflict with those decisions. To the contrary, just as did the Fifth and Ninth Circuits, the Third Circuit *declined* immediate review of an order denying an objection to a municipal bankruptcy case. There is, in fact, not a single reported decision at any level concluding that an order like the Bankruptcy Court's order in this case is subject to an immediate interlocutory appeal.

Finally, there is no Tenth Amendment or other constitutional question here. This Court long ago upheld the constitutionality of the municipal bankruptcy laws, largely on the ground that the federal law is premised upon state consent. *United States v. Bekins*, 304 U.S. 27, 54 (1938). Here, the State of California specifically authorized the Respondent to file a bankruptcy case and invoke the protections of chapter 9. The State has never contended that the Respondent's bankruptcy case is improper or otherwise an affront to its sovereignty. In this light, the Petitioners' attempts to champion "states' rights" ring particularly hollow, and the Petitioners' invitation to

fashion a constitutional rule of immediate appeal is unavailing and unsupportable.

For these and the reasons set forth in more detail below, no grounds exist to grant a writ in this case, and the Respondent respectfully requests that the Court deny the Petition.

## I. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THE BANKRUPTCY CODE AND THE SETTLED LAW OF FEDERAL APPELLATE JURISDICTION

In bankruptcy cases, as in other litigation in the federal courts, an aggrieved litigant generally has the right to appeal only final orders of the bankruptcy court. 28 U.S.C. §§ 158(a)(1), 158(d).[1]

Pursuant to this final judgment rule, appellate courts routinely dismiss appeals taken from bankruptcy court orders that deny a creditor's motion to dismiss a debtor's voluntary bankruptcy case.[2] In the order at issue here, the

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[1] The "salutary purposes" of the final judgment rule are well recognized and need not be reiterated here. *See, e.g., Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 203 (1999).

[2] *E.g., Dunkley v. Rega Properties, Ltd. (In re Rega Properties, Ltd.)*, 894 F.2d 1136, 1137-39 (9th Cir. 1990); *Promenade Nat'l Bank v. Phillips (In re Phillips)*, 844 F.2d 230, 233-36 (5th Cir. 1988); *Farber v. 405 N. Bedford Dr. Corp. (In re 405 N. Bedford Dr. Corp.)*, 778 F.2d 1374, 1378-79 (9th Cir. 1985); *In re Cash Currency Exchange, Inc.*, 762 F.2d 542, 546 (7th Cir. 1985); *In re Committee of Asbestos-Related Litigants*, 749 F.2d 3, 5 (2d Cir. 1984); *Warner v. Unsecured Creditors' Committee (In re Warner)*, 94 B.R. 734, 735-36 (M.D. Fla. 1988); *Whaley v. United States*, 76 B.R. 95, 96 (N.D. Miss. 1987); *Guyther v. Hebb (In re Hebb)*, 53 B.R. 1003, 1005 (D. Md. 1985).

Bankruptcy Court did just that – it denied the Petitioners' objection to and motion to dismiss the Respondent's bankruptcy case. Pet. at 23a-51a.

Following the established precedent, the Bankruptcy Appellate Panel for the Ninth Circuit concluded that the Bankruptcy Court's order was interlocutory and therefore dismissed the Petitioners' appeal. Pet. at 20a-22a. The Ninth Circuit affirmed that dismissal, holding that "[t]he denial of an objection to and a motion to dismiss a chapter 9 bankruptcy does not irreparably injure a party so that later addressing the issue would be futile." Pet. at 3a, 19a.[3]

Despite their concession that the Bankruptcy Court's order is interlocutory, the Petitioners assert that the Ninth Circuit erred, and that the basic rule of finality should not apply here, because the Respondent's bankruptcy case was commenced under chapter 9 of the Bankruptcy Code rather than another chapter. Specifically, the Petitioners seek to bypass the final judgment rule by arguing that section 921(e) of the Bankruptcy Code uniquely authorizes interlocutory appeals in municipal bankruptcy cases and that the Bankruptcy Court's order is appealable under the "collateral order" doctrine. Neither argument has merit.

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[3] The Petitioners failed to reproduce a complete copy of the Ninth Circuit's amended opinion in their Appendix. Accordingly, citations to the opinion are made both to the pages of the Appendix containing the original opinion, and to the pages setting forth the amendments made on denial of the petition for rehearing. A complete copy of the amended opinion is published at 339 F.3d 782 (9th Cir. 2003).

### A. Section 921(e) Does Not Authorize Interlocutory Review.

For the first time, the Petitioners argued in their petition for rehearing to the Ninth Circuit that section 921(e) of the Bankruptcy Code authorizes an immediate interlocutory appeal. The Ninth Circuit properly rejected this belated argument that now forms the centerpiece of the Petitioners' arguments.

Section 921 of the Bankruptcy Code concerns petitions and objections to petitions under chapter 9. Subsection (e) of section 921 is straightforward – it forbids any stay or delay pending appeal of an order finding jurisdiction over a chapter 9 case, and it validates debts incurred during the bankruptcy case even if such an order later is reversed on appeal:

> (e) The court may not, on account of an appeal from an order for relief, delay any proceeding under this chapter in the case in which the appeal is being taken; nor shall any court order a stay of such proceeding pending such appeal. The reversal on appeal of a finding of jurisdiction does not affect the validity of any debt incurred that is authorized by the court under section 364(c) or section 364(d) of this title.

11 U.S.C. § 921(e).

The Petitioners argue that section 921(e) "presupposes a right to an immediate review by appeal" of orders like the one at issue in this case. Pet. at 10. To the contrary, the first part of section 921(e) simply *prohibits* the issuance of a stay when *discretionary* interlocutory review of the order is granted. The clear purpose of section 921(e) is to override provisions like Rule 8005 of the Federal Rules

of Bankruptcy Procedure, which otherwise empowers bankruptcy and appellate courts to stay proceedings pending an appeal. *See* Fed. R. Bankr. P. 8005.

The second part of section 921(e) merely protects the validity of debts incurred during a chapter 9 case in the event that an appellate court later finds that the bankruptcy court did not have jurisdiction. It does not speak to *when* an appeal may be taken, and it logically addresses the consequences of a reversal on an appeal taken after a final judgment concluding a bankruptcy case.

Nothing in section 921(e) *authorizes* an immediate interlocutory appeal. When Congress wants to grant such authorization, it does so explicitly and not implicitly or, to use the words of the Petitioners, by "presupposition." For example, Congress *expressly* has authorized immediate appellate review of "interlocutory orders and decrees issued under section 1121(d)" of the Bankruptcy Code. 28 U.S.C. § 158(a)(2). Congress also *expressly* has authorized immediate appellate review of (a) "[i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions"; (b) [i]nterlocutory orders appointing receivers. . . ."; and (c) [i]nterlocutory decrees . . . determining the rights and liabilities of the parties to admiralty cases." 28 U.S.C. § 1292(a).

There is no such express authorization here. To the contrary, Congress has limited appellate jurisdiction over orders like the Bankruptcy Court's order to those appeals where review is granted "with leave of the court." 28 U.S.C. § 158(a)(3). The legislative history cited by the Petitioners confirms this. The Senate's version of the precursor to section 921(e) specifically "*prohibited* interlocutory appeals from a finding of jurisdiction, in order to

prevent delay in the proceedings and increase the marketability of" debt issued by the municipality. Pet. at 109a (emphasis added). The final bill eliminated that express prohibition of interlocutory appeals, but set forth protections against delay and invalidation of debt incurred during the case. *Id.* The only plausible interpretation of this is that Congress desired to retain the appellate courts' discretionary authority to grant interlocutory review, but to remove the courts' ability to stay proceedings in the event that such discretionary review was granted. Nothing in the statute or the legislative history even remotely suggests that the removal of a *prohibition* on all *interlocutory* appeals should be interpreted as an express *authorization* of immediate interlocutory review in *every* case.

### B. The Bankruptcy Court's Order Is Not An Appealable "Collateral Order."

The "collateral order" doctrine authorizes appellate review "from a narrow class of decisions that do not terminate the litigation, but must, in the interest of achieving a healthy legal system, nonetheless be treated as final." *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (quotation omitted). The doctrine encompasses only those orders "that are conclusive, that resolve important questions completely separate from the merits, and that would render such important questions effectively unreviewable on appeal from final judgment in the underlying action." *Id.* This is a "narrow exception" to the final judgment rule that, this Court repeatedly has admonished, "should stay that way and never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been

entered, in which claims of district court error at any stage may be ventilated." *Id.* at 868 (citations omitted).

The Bankruptcy Court's order here fails all three required elements of the collateral order doctrine. First, it does not "conclusively" resolve a question that is "completely separate from the merits." As the Ninth Circuit noted, the question of whether the Respondent filed its bankruptcy case in good faith is one that can be raised at any time during the bankruptcy case:

> [T]he denial of Silver Sage's initial objection to the bankruptcy does not resolve the issue of bad faith in such a way that the bankruptcy court may not later dismiss the petition. If it does appear, at some time, that the City is failing to act in good faith, the bankruptcy court may dismiss the petition altogether.

Pet. at 2a, 16a. More broadly, in order to confirm a plan of adjustment of debts – which is the *raison d'etre* of a chapter 9 case – the Respondent will have to establish that the plan complies with all of the requirements of chapter 9 and the other applicable provisions of the Bankruptcy Code. *See* 11 U.S.C. § 943. Thus, far from being "collateral," the Bankruptcy Court's order goes to the very core of the underlying bankruptcy case, as it addresses the Respondent's eligibility to adjust its debts under the federal bankruptcy laws.[4]

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[4] *Cf. Warner*, 94 B.R. at 737 (order denying a motion to dismiss chapter 11 case is not a collateral order; "The bankruptcy court order denying Warner's motion to dismiss in this case does not resolve issues independent and easily separable from the other claims in the action."); *Hebb*, 53 B.R. at 1006 (order denying a motion to dismiss chapter 13

(Continued on following page)

Second, and just as importantly, the Bankruptcy Court's order is reviewable on appeal from an order confirming the Respondent's plan of adjustment or any other final judgment that concludes the Respondent's bankruptcy case. As the Fifth Circuit held in a case directly on point, an order denying an objection to a chapter 9 case is not a collateral order because "[t]he question of subject matter jurisdiction is far from unreviewable on appeal from a final judgment. When there is a final judgment in this case appellants will be free to raise the issue of subject matter jurisdiction yet again." *Path-Science Laboratories, Inc. v. Greene County Hospital (In re Greene County Hospital)*, 835 F.2d 589, 596 (5th Cir. 1988); *see also Cash Currency Exchange*, 762 F.2d at 547 (order denying motion to dismiss chapter 11 case is not a collateral order; "The denial of a motion to dismiss, . . . if erroneous, may be reversed on appeal from the approval of a final plan of reorganization.").

The Petitioners make the novel argument that the mere fact of the bankruptcy case itself causes an irreparable harm that compels immediate review. Pet. at 19-20. The Ninth Circuit correctly rejected this assertion:

> A court's denial of such a motion merely allows the municipality to proceed with the bankruptcy. We are not convinced that Congress's whole municipal bankruptcy statutory scheme is so skewed in favor of the municipality that the commencement of proceedings itself causes

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case is not a collateral order; "The order addressed issues closely related to the merits of the main action, albeit in a nondispositive manner, thereby falling outside the collateral order doctrine.").

> irreparable injury. To so hold would essentially say that a creditor's rights are determined before the bankruptcy process really begins.

Pet. at 2a, 15a.

As the Ninth Circuit noted, there are many protections available to creditors in a chapter 9 case, including the right to request withdrawal of the jurisdictional reference to the bankruptcy court (28 U.S.C. § 157(d)); the right to seek relief from the automatic stay (11 U.S.C. § 362(d)); the right to petition for adequate protection of interests in property (11 U.S.C. § 361); and the right to move at any time to dismiss the case (11 U.S.C. § 930). Pet. at 14a-16a. Moreover, if the Petitioners had been able to articulate any particular harm from the Bankruptcy Court's order, they could have been granted permission to pursue an interlocutory appeal.

In any event, this Court time and time again has rejected analogous arguments that a purported right to be free from suit in a forum that purportedly lacks jurisdiction is "effectively destroyed" unless vindicated through an immediate appeal. *See, e.g.*, *Digital Equipment*, 511 U.S. at 867-83 (order granting motion to vacate dismissal of action not a collateral order); *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 498-501 (1989) (order denying motion to dismiss based upon contractual forum selection clause not a collateral order); *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521-30 (1988) (order denying motion to dismiss on ground that extradited person was immune from civil process and on ground of *forum non conveniens* is not a collateral order); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 275-78 (1988) (order denying motion to stay or dismiss on basis of pending state court action is not a collateral order).

The Petitioners' similar assertions of a right to an immediate appeal of the Respondent's bankruptcy case here similarly should be rejected.

## II. THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE HOLDING OF ANY COURT AT ANY LEVEL

The only two other reported decisions on point are in accord with the Ninth Circuit's decision in this case, with each holding that an order denying an objection to or motion to dismiss a chapter 9 municipal bankruptcy case is interlocutory and not immediately reviewable. *Greene County*, 835 F.2d at 595-96; *In re Pleasant View Utility Dist.*, 27 B.R. 552, 553-54 (M.D. Tenn. 1982). There is not a single reported decision at any level holding that such an order is subject to an immediate appeal.

The Petitioners attempt to manufacture a circuit conflict by citing the unpublished decision of the Third Circuit in *Pennbank v. Washabaugh (In re North and South Shenango Joint Municipal Authority)*, 673 F.2d 1301 (3d Cir. 1981) (mem.), cited by the Petitioners for the first time only in their petition for rehearing to the Ninth Circuit. Pet. at 16-17. In *Shenango*, however, the Third Circuit *declined* immediate review of an order denying an objection to a municipal bankruptcy case. Specifically, the Circuit denied a petition for writ of mandamus and held that any error of the bankruptcy court "may be raised through the prescribed process of appeal." Pet. at 118a. Much as they do with section 921(e), the Petitioners try to extrapolate this into an implied right of immediate appeal. However, the Circuit never addressed the issue of *when* the "prescribed process of appeal" would be undertaken. Under the clear authority set forth above, the only logical

reading is that the "process" referenced by the Circuit was the standard "process" involving discretionary interlocutory review, and review as a matter of right only after the entry of a final judgment itself.

## III. THE NINTH CIRCUIT'S DECISION DOES NOT RAISE ANY ISSUE OF CONSTITUTIONAL LAW

The Petitioners argue that a failure to accord them an immediate appeal "creates the opportunity for the Tenth Amendment power of the states to be ignored." Pet. at 15. This fantastic claim merits little scrutiny.

Chapter 9 in fact is crafted to *preserve* state sovereignty by requiring that, unlike under other chapters of the Bankruptcy Code, a municipal debtor be "specifically authorized, in its capacity as a municipality or by name, to be a debtor . . . by State law. . . ." 11 U.S.C. § 109(c)(2). Moreover, as the Petitioners recognize, chapter 9 expressly and unambiguously preserves a state's control over its municipalities while a bankruptcy case is pending. *See* 11 U.S.C. §§ 903, 904.

This Court specifically has held that the requirement of state consent, and the limitations on a bankruptcy court's control over a municipality during a bankruptcy case, protect the municipal bankruptcy laws from an attack based on Tenth Amendment or sovereign immunity grounds:

> The bankruptcy power is competent to give relief to debtors in such a plight and, if there is any obstacle to its exercise in the case of the districts organized under state law it lies in the right of the State to oppose federal interference. The State steps in to remove that obstacle. The State

> acts in aid, and not derogation, of its sovereign powers. It invites the intervention of the bankruptcy power to save its agency which the State itself is powerless to rescue. Through its cooperation with the national government the needed relief is given. We see no ground for the conclusion that the Federal Constitution, in the interest of state sovereignty, has reduced both sovereigns to helplessness in such a case.

*Bekins*, 304 U.S. at 54.

Here, the State of California has authorized the Respondent to file a chapter 9 bankruptcy case. *See* Cal. Gov't Code §§ 43739, 53760.[5] The State has never objected to the Respondent's bankruptcy case or otherwise contested any actions taken in that case. In this light, the Petitioners' assertions of "states' rights" are empty. Most importantly for purposes of the Petition, any conceivable argument that the Respondent's bankruptcy case is improper – whether based on the Constitution, the Bankruptcy Code, or anything else – will be preserved and can be addressed on an appeal from a final judgment.

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[5] Contrary to the Petitioners' baseless assertions, in addition to finding state authorization, the Bankruptcy Court found that the City satisfied all of the other statutory qualifications for chapter 9 eligibility as well. *See* Pet. at 44a-46a.

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 03-702

# In the Supreme Court of the United States

SILVER SAGE PARTNERS, LTD, a California limited partnership; ROBERT E. FILLET, PAUL SABEN, RICHARD L. EARLIX, general partners and individually; MICHAEL S. LINSK; EDWARD MOORE, JR., and ALBERT PIMENTEL,

*Petitioners*,

v.

CITY OF DESERT HOT SPRINGS,

*Respondent*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## REPLY BRIEF IN SUPPORT OF PETITION

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## TABLE OF CONTENTS

Table of Contents . . . . . i

Table of Authorities . . . . . ii

Introduction and Summary of the Argument . . . . . 1

I. The City's speculation that Congress intended no immediate appeal of an order allowing a city into bankruptcy despite the specific reference to that right in the statute (11 U.S.C. 921(e)) and the Circuit conflict on that issue, show that this Court should settle this important question of federal appellate jurisdiction . . . . . 1

II. An order allowing a city into bankruptcy is sufficiently final - because it is unreviewable later; and is the "final" word on Congress's preconditions for a city to enter bankruptcy; and because of the significant prejudice to creditors, taxpayers and the public - to qualify as immediately appealable under this Court's "collateral order" doctrine . . . . . 5

Conclusion . . . . . 8

## TABLE OF AUTHORITIES

**Cases**

*Cohen v. Beneficial Indus. Loan Corp.*,
337 U.S. 541 (1949) . . . . . 6

*Gulfstream v. Mayacamas Corp.*,
485 U.S. 271, 108 S. Ct. 1133,
99 L. Ed. 2d 296 (1988) . . . . . 6

*In re Cottonwood Water & Sanitation Dist.*,
138 B.R. 973 (Bankr. D. CO. 1992) . . . . . 2, 8

*In re Miracle Church of God in Christ*,
119 B.R. 308 (MD FL 1990) . . . . . 6

*In re Sullivan County Regional Refuse Disposal Dist.*,
165 B.R. 60 (D NH 1994) . . . . . 6

*In the matter of: North and South Shenango Joint Municipal Authority*,
80 B.R. 57 (WD PA 1982) . . . . . 4

*Pennbank v. Washabaugh* (*In re North and South Shenango Joint Municipal Authority*),
8 BCD 509, 5 CBC2d 869 (3rd Cir. 1981) . . . . . 4

*Silver Sage Partners, Ltd. v. City of Desert Hot Springs* (*In re City of Desert Hot Springs*),
327 F.3d 930 (9th Cir. 2003) . . . . . 6

*United States v. Bekins*,
304 U.S. 27, 58 S. Ct. 811,
82 L. Ed. 1137 (1938) . . . . . 2

**Statutes**

11 U.S.C. § 109(c) . . . . . 7, 8
11 U.S.C. § 921(e) . . . . . 1, 3, 7
11 U.S.C. § 943(b)(4) . . . . . 2

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

The City of Desert Hot Springs, California ("City") argues that bankruptcy law is "über alles"; it even, according to the City, supersedes the United States Constitution which makes clear that all power to govern cities belongs to the States of which they are subdivisions, not the bankruptcy courts. Thus, the City argues that Chapter 9 city bankruptcies are plain vanilla bankruptcies and are just like those under all other chapters of the Bankruptcy Act, which means that there should be no review of an order that allows a city bankruptcy to proceed.

While this argument supports the City's avowed purpose in filing for bankruptcy - to evade the State of California's law requiring it to pay all final tort judgments, Congress, in response to this Court's precedent, expressly recognized that the Tenth Amendment to the United States Constitution prevents federal law from preempting the State's right to control its cities or evade state responsibilities. It also specifically provided for an immediate appeal of a bankruptcy court's decision allowing, over objections, a city to enter bankruptcy.

### I. The City's speculation that Congress intended no immediate appeal of an order allowing a city into bankruptcy despite the specific reference to that right in the statute (11 U.S.C. 921(e)) and the Circuit conflict on that issue, show that this Court should settle this important question of federal appellate jurisdiction

First, the factual context in which this federal appellate jurisdiction question is presented should be noted. The City

of Desert Hot Springs admits that its bankruptcy is an attempted end run around the dictates of Chapter 9 bankruptcy law which require that it comply with all state laws even those requiring that it pay all final judgments against it. See, e.g., 11 U.S.C. § 943(b)(4) ("The court shall confirm the plan [of adjustment of debts] if [] the debtor *is not prohibited by law*[1] from taking any action necessary to carry out the plan"). Indeed, nowhere in its opposition does the City ever disavow that its purpose in filing bankruptcy is to evade California's requirement that it pay Silver Sage's tort judgment against it[2] (referring dismissively to Silver Sage, which has a final federal question money judgment based upon the Fair Housing Act against it, as just another "unsecured creditor", *see* Opps'n. p. 1).

First, to support the City's claim to the unreviewability of a bankruptcy court's order allowing a city into bankruptcy, it argues that city bankruptcies under Chapter 9 are just like all other bankruptcies. In support, it offers a host of irrelevant case law decided under other provisions of the Bankruptcy Act which are applicable only to business and personal bankruptcies. *See* Opps'n. p. 2, n. 2. However, Chapter 9, which pertains only to local governmental entities, is meant to be rarely available and has strict preconditions to entry which are present in no other type of bankruptcy. The federal courts have all recognized this as true, until the Ninth Circuit spoke in this case. *See, e.g., In re Cottonwood Water & Sanitation Dist.*, 138 B.R. 973, 979 (Bankr. D. CO. 1992) ("Important

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[1] The reference to state law in the Chapter 9 statute is "manifestly to state law". *See United States v. Bekins*, 304 U.S. 27, 49, 58 S. Ct. 811, 82 L. Ed. 1137 (1938).

[2] *See* Appendix pp. 87a-88a (Cal. Gov. Code §§ 970.2 - 970.5).

constitutional issues arise when a municipality enters the bankruptcy arena. Recognizing these problems, Congress consciously sought 'to limit accessibility to the bankruptcy court' by municipalities.").

Secondly, while conceding that Congress spoke directly to the appealability of an order allowing a city into bankruptcy at issue here, the City speculates that Title 11 U.S.C. section 921(e) of chapter 9[3] , which describes what happens *when* (not *if* an appeal is allowed, as the City suggests) an appeal is taken from a bankruptcy court's grant of an "order for relief", only means that the federal courts "may" allow appellate review. The City does not cite a single case or even any legislative history in support of its position. Rather, it seeks to mislead by misstating what the legislative history Silver Sage cites actually says.

In focusing solely upon the Senate version of the 1976 law (as to section 921(e)), the City entirely ignores the fact that the United States House of Representatives' version of the same bill did allow (as did former law) the immediate appeal of a bankruptcy court's grant of an order for relief in a Chapter 9 municipal bankruptcy. More importantly, the transcript of the bankruptcy law reconciliation process

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[3] It was 11 U.S.C. § 405 under the former version of the Chapter for municipal bankruptcies. The text of section 921(e) reads:

> The court may not, on account of an appeal from an order for relief, delay any proceeding under this chapter in the case in which the appeal is being taken; nor shall any court order a stay of such proceeding pending such appeal. The reversal on appeal of a finding of jurisdiction does not affect the validity of any debt incurred that is authorized by the court under section 364(c) or 364(d) of this title.

between the House and Senate versions of the bill emphatically states that the immediate appeal right survived the reconciliation negotiations. *See* Appendix page 109a (*United States Code Congressional and Administrative News*:

> "The proposed text [of the joint and final bill actually enacted] includes compromise language designed to achieve [the reconciliation of the Senate and House versions both allowing *an immediate interlocutory appeal* and the Senate bill's language concerning the no-stay provision during the appeal and validating debt issued by a city in bankruptcy even if the bankruptcy is dismissed as a result of the appeal]."

Finally, the City also claims that there is no conflict between or among the Circuits as to whether an immediate appeal is contemplated by section 923(e) and that all courts have agreed that there is not. Opps'n. pp. 11-12. Its argument on this point is clearly mistaken. The City claims that the *per curiam* Third Circuit opinion in *Pennbank v. Washabaugh* (*In re North and South Shenango Joint Municipal Authority*), 8 BCD 509, 5 CBC2d 869 (3rd Cir. 1981), only decided not to grant a writ because an appeal was available "only after the entry of a final judgment itself". Opps'n. at 11. Not only is that argument supported only by the City's guesswork, but the decision itself and the subsequent history of the case conclusively shows the opposite. *See*, *e.g.*, Appendix p. 116a and 117a, stating that the petition for writ of mandamus challenged the bankruptcy court's order for relief in response to Pennbank's "motion to dismiss" the Chapter 9 bankruptcy for lack of jurisdiction case and noting Pennbank's simultaneous *appeal* of that denial of its motion to dismiss. *See also* the subsequent reported bankruptcy case *In the matter of: North and South Shenango Joint Municipal Authority*, 80 B.R. 57 (WD PA 1982) (the

district court sitting as a reviewing court as to the bankruptcy court's decision to grant an order for relief, dismissed the bankruptcy pursuant to the immediate appeal referenced in the Third Circuit's opinion).

The City is also wrong in stating that the Fifth Circuit agrees with the Ninth that there is no immediate right of appeal of a bankruptcy court grant of an order for relief. In *Path-Science Laboratories, Inc. v. Greene County Hospital* (*In re Greene County Hospital*), 835 F.2d 589, 590 (5th Cir. 1988), the Fifth Circuit (utilizing extensive baseball imagery) never reviewed the grant of an order for relief; rather, it reviewed a bankruptcy court's decision that a debtor was eligible on account of its quasi-governmental status to file a chapter 9, *not* a chapter 11, debtor as it had claimed when it filed. Accordingly, the Third and Ninth Circuit decisions conflict on the immediate appeal question.

**II. An order allowing a city into bankruptcy is sufficiently final - because it is unreviewable later; and is the "final" word on Congress's preconditions for a city to enter bankruptcy; and because of the significant prejudice to creditors, taxpayers and the public - to qualify as immediately appealable under this Court's "collateral order" doctrine**

The City seeks to mislead this Court on the "collateral order" discussion as well. It first claims that the Ninth Circuit stated that the question of whether the bankruptcy should be allowed in the first place is reviewable later - after the bankruptcy has been completed. *See* Opps'n. p. 8. Its sole support for this is a quote from the Ninth Circuit's opinion that, in fact, says no such thing. The quote references not the issue of reviewability of the Bankruptcy Court's decision as to the propriety of the bankruptcy filing,

but instead notes that the bankruptcy judge's ongoing power to supervise the bankruptcy proceedings allows it to dismiss a Chapter 9 bankruptcy case if the bankruptcy court becomes convinced that the city is acting in bad faith *in the conduct of the bankruptcy*.[4] *Silver Sage Partners, Ltd. v. City of Desert Hot Springs* (*In re City of Desert Hot Springs*), 327 F.3d 930, 936 (9th Cir. 2003) (". . . . *If it does appear, at some [later] time*, that the City is failing to act in good faith[in the bankruptcy proceeding], the bankruptcy court may dismiss the petition altogether.").

More importantly in terms of this Court's "collateral order" doctrine analysis[5], the City never shows that the three prongs of that test are not met (a conclusive determination as to the qualification of a city to be in bankruptcy; that the question of a city's qualification to file bankruptcy is separate

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[4] Moreover, the City's argument conflates the analysis of a bad faith filing with the bad faith conduct of a case and the proposing of a bankruptcy "plan" in bad faith. These are three separate, albeit related, matters and, most assuredly, are not treated as one and the same by the courts. *See In re Sullivan County Regional Refuse Disposal Dist.*, 165 B.R. 60, 80 (D NH 1994) ("Chapter 9 is the only chapter which currently expressly mentions good faith"); *In re Miracle Church of God in Christ*, 119 B.R. 308 (MD FL 1990) ("this standard of good faith is implicit in every stage of a bankruptcy case").

[5] A collateral order is reviewable under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), if it (i) conclusively determines the question present; (ii) resolves an important issue that is completely collateral to the merits; and (iii) concerns a right that would be effectively unreviewable after a final judgment on the merits. *See Gulfstream v. Mayacamas Corp.*, 485 U.S. 271, 276, 108 S. Ct. 1133, 99 L. Ed. 2d 296 (1988).

from the merits of who gets paid what in the bankruptcy itself and that that determination is unreviewable later).

Indeed, all three prongs are present here. Since a city's qualification to enter bankruptcy is conclusively determined at the outset, the meeting of the relevant Congressional factors are clearly not reviewable later after the bankruptcy has already been completed; that question is only reached once - at the beginning of the bankruptcy. The City also does not and cannot explain why the question of qualification to be in bankruptcy is not separate from the merits of who gets paid what in the bankruptcy. Indeed it is clear, that whether a city meets Congress's disclosure and negotiation requirement before filing, filed for a proper purpose, or is actually insolvent under Congress's definition, are separate from the merits of a confirmed bankruptcy plan. Thus, such questions as whether a city improperly gerrymandered claims to employ "cram down" upon a specific creditor or whether its plan complies with all state laws, are clearly separate from whether a city is actually insolvent as Congress defines it, whether it negotiated a confirmable plan before filing, etc.[6]

Finally, the City argues that if there is no immediate appeal, there is no prejudice to any party. *See* Opps'n. p. 9. In fact, for several reasons unaddressed by the City, this is not true. First, Congress eliminated prejudice to the debtor *City* by its provision of an immediate appeal right to creditors or other interested parties. *See* 11 U.S.C. § 921(e), which prevents a city's bankruptcy from being stayed during the appeal and provides that any debt undertaken by a city in bankruptcy while the appeal is pending is valid even if the bankruptcy is dismissed incident to the appeal.

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[6] All showings required by 11 U.S.C. § 109(c).

The City also never mentions that the prejudice to the creditors of a city, its employees and its taxpayers, is palpable if there is no immediate appeal. Because Congress's preconditions are decided only once and the bankruptcy court may be in error as to one or more of them, Congress's important preconditions such as proof of insolvency, etc., are rendered advisory only if there is no immediate appeal.

Additionally, since a bankruptcy court cannot, for Tenth Amendment reasons, control a city in bankruptcy or appoint a trustee, limit its spending or operations or prevent dissipation of its assets, a city is free to, as has already occurred here, not pay a penny to its creditors or its employees during the bankruptcy (as to pre-petition wages or pension contributions) or even ignore obligations to pay tax refunds to its taxpayers. All the while, it may spend however it wishes and encumber or sell any of its property at its unbridled discretion. This is why Congress made entry into Chapter 9 difficult, which, in and of itself, supports the view that an immediate appeal of bankruptcy orders allowing a city into bankruptcy are appealable. *See* Congress' requirements of 11 U.S.C. § 109(c); and *In re Cottonwood Water & Sanitation Dist.*, 138 B.R. at 979.

## CONCLUSION

This Court should review and settle the important federal jurisdictional question of whether there is an immediate appeal of the "jurisdictional" determination by a bankruptcy court to allow a city to enter bankruptcy. Since this decision necessarily carries with it complicated Federal and State power issues and extensive prejudice to the city's residents, its creditors, employees and the business community, Congress made such decisions reviewable as of right. They

should also be reviewable under the Court's "collateral order" doctrine in any event.

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Respectfully Submitted,

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